DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 09-987
Vide 09-988, 09-991

Title	Arizona Christian School Tuition Organization, Petitioner v. Kathleen M. Winn, et al.
Docketed	February 22, 2010
Linked with 09A652	
Lower Ct.	United States Court of Appeals for the Ninth Circuit
Case Nos.	(05-15754)
Decision Date	April 21, 2009
Rehearing Denied	October 21, 2009

Questions Presented

---Date---	--------Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 7 2010	Application (09A652) to extend the time to file a petition for a writ of certiorari from January 19, 2010 to February 18, 2010, submitted to Justice Kennedy.
Jan 15 2010	Application (09A652) granted by Justice Kennedy extending the time to file until February 18, 2010.
Feb 18 2010	Petition for a writ of certiorari filed. (Response due March 24, 2010)
Mar 18 2010	Order extending time to file response to petition to and including April 23, 2010.
Mar 24 2010	Brief amici curiae of Jewish Tuition Organization, et al. filed. VIDED.
Apr 23 2010	Brief of respondents Kathleen M. Winn, et al. in opposition filed. VIDED.
May 4 2010	DISTRIBUTED for Conference of May 20, 2010.
May 24 2010	Petition GRANTED. The petition for a writ of certiorari in No. 09-991 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jun 15 2010	The time within which to file the joint appendix and petitioners' briefs on the merits is extended to and including July 30, 2010. VIDED.
Jun 15 2010	The time within which to file respondents' brief on the merits is extended to and including September 15, 2010. VIDED.
Jun 21 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for respondents in support Arizona School Trust, et al. VIDED.
Jun 30 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents. VIDED.
Jul 1 2010	Motion for divided argument filed by petitioner Arizona Christian School Tuition Organization. VIDED.
Jul 8 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for petitioner Garriott. VIDED.
Jul 30 2010	Brief of petitioner Gale Garriott filed. VIDED.
Jul 30 2010	Brief of petitioner Arizona Christian School Tuition Organization filed. VIDED.
Jul 30 2010	Brief of respondents Glenn Dennard, et al. in support of petitioners filed.

	VIDED.
Jul 30 2010	Joint appendix filed. VIDED. (Statement of costs filed)
Aug 4 2010	Brief amici curiae of Cato Institute, Andrew Coulson, et al. filed. VIDED.
Aug 4 2010	Brief amici curiae of Florida School Choice Fund, et al. filed. VIDED.
Aug 5 2010	Brief amicus curiae of Center for Constitutional Jurisprudence filed. VIDED.
Aug 5 2010	Brief amicus curiae of United States Conference of Catholic Bishops, et al. filed. VIDED.
Aug 5 2010	Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
Aug 6 2010	Brief amicus curiae of United States filed. VIDED.
Aug 6 2010	Brief amicus curiae of Agudath Israel of America filed. VIDED. (Distributed)
Aug 6 2010	Brief amicus curiae of The Becket Fund for Religious Liberty filed. VIDED.
Aug 6 2010	Brief amici curiae of American Center for School Choice filed. VIDED.
Aug 6 2010	Brief amici curiae of Liberty Counsel and American Association of Christian Schools filed
Aug 6 2010	Brief amici curiae of Jewish Tuition Organization, et al. filed. VIDED.
Aug 6 2010	Brief amici curiae of Ethics and Religious Liberty Commission of the Southern Baptist Convention, et al. filed. VIDED.
Aug 6 2010	Brief amici curiae of Indiana, et al. filed. VIDED.
Aug 6 2010	Brief amicus curiae of The Rutherford Institute filed. VIDED.
Aug 6 2010	Brief amici curiae of Christian Educators Association International, and Advocates for Faith and Freedom filed. VIDED.
Aug 6 2010	Brief amici curiae of Goldwater Institute, and U.S. Representative Trent Franks filed. VIDED.
Aug 6 2010	Brief amicus curiae of Justice and Freedom Fund filed. VIDED.
Aug 6 2010	Brief amicus curiae of American Center for Law and Justice filed. VIDED.
Aug 11 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for petitioner Arizona Christian School Tuition Organization. VIDED.
Aug 16 2010	CIRCULATED.
Aug 17 2010	Supplemental brief of respondents Kathleen M. Winn, et al. filed. VIDED. (Distributed)
Aug 24 2010	SET FOR ARGUMENT ON Wednesday, November 3, 2010.
Aug 25 2010	Supplemental response filed by respondents Glenn Dennard, et al. in support of petitioners. VIDED. (Distributed)
Aug 26 2010	Supplemental response filed by petitioner Arizona Christian School Tuition Organization. VIDED. (Distributed)
Sep 2 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Sep 3 2010	Joint Motion of petitioner Gale Garriott and the Acting Solicitor General for leave to allow the United States to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Sep 7 2010	Reply of petitioner Gale Garriott to supplemental brief of respondents filed. VIDED. (Distributed)
Sep 9 2010	Supplement of petitioner Arizona Christian School Tuition Organization to the motion for divided argument. VIDED.
Sep 15 2010	Response of petitioner Gale Garriott and the United States to petitioner Arizona Christian School Tuition Organization's supplement to motion for divided argument. VIDED.
Sep 15 2010	Brief of respondents Kathleen M. Winn, et al. filed. (Distributed) VIDED.
Sep 22 2010	Brief amici curiae of American Humanist Association, et al., filed. VIDED. (Distributed)
Sep 22 2010	Brief amici curiae of Americans United for Separation of Church and State, et al., filed. VIDED. (Distributed)

Sep 22 2010	Brief amici curiae of National School Boards Association, et al. filed. VIDED. (Distributed)
Oct 12 2010	Motion for divided argument filed by petitioner Arizona Christian School Tuition Organization DENIED. VIDED.
Oct 12 2010	Joint Motion of petitioner Gale Garriott and the Acting Solicitor General for leave to allow the United States to participate in oral argument as amicus curiae and for divided argument GRANTED. and the time is divided as follows: 15 minutes for petitioner Gale Garriott, and 15 minutes for the United States. VIDED.
Oct 15 2010	Reply of petitioner Arizona Christian School Tuition Organization filed. VIDED. (Distributed)
Oct 15 2010	Reply of petitioner Gale Garriott filed. VIDED. (Distributed)
Oct 15 2010	Reply of respondents Glenn Dennard, et al. in support of petitioners filed. VIDED. (Distributed)
Nov 3 2010	Argued. For petitioners: Neal K. Katyal, Acting Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae), and Paula S. Bickett, Chief Counsel for Civil Appeals, Phoenix, Ariz. For respondents: Paul Bender, Phoenix, Ariz.
Nov 24 2010	Motion for leave to file a supplemental brief after argument filed by petitioner Arizona Christian School Tuition Organization. VIDED.
Dec 6 2010	Motion for leave to file a supplemental brief after argument filed by petitioner GRANTED. VIDED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 09-987 FEB 18 2010

OFFICE OF THE CLERK

In The Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.,
Petitioners,

v.

KATHLEEN M. WINN, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 18, 2010

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QUESTIONS PRESENTED

1. Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds?

2. Is the Respondents' alleged injury—which is solely based on the theory that Arizona's tax credit reduces the state's revenue—too speculative to confer taxpayer standing, especially when considering that the credit reduces the state's financial burden for providing public education and is likely the catalyst for new sources of state income?

3. Given that the Arizona Supreme Court has authoritatively determined, under state law, that the money donated to tuition granting organizations under Arizona's tax credit is private, not state, money, can the Respondents establish taxpayer standing to challenge the decisions of private taxpayers as to where they donate their private money?

PARTIES TO THE PROCEEDING

Petitioners are Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue, Arizona School Choice Trust, Luis Moscoso, Glenn Dennard, and Arizona Christian School Tuition Organization.

Respondents are Kathleen M. Winn, Maurice Wolfthal, and Lynn Hoffman.

CORPORATE DISCLOSURE STATEMENT

Petitioners Arizona Christian School Tuition Organization and Arizona School Choice Trust do not have parent companies and are not publicly held.

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Other Authorities:

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DECISIONS BELOW

The district court's ruling granting Arizona School Choice Trust's motion to dismiss is reported at 361 F. Supp. 2d 1117 and reprinted in Appendix (App.) at App. 44a-59a. The Ninth Circuit panel opinion is reported at 562 F.3d 1002 and reprinted in App. 1a-43a. The order denying the petitions for rehearing en banc, and the accompanying opinions concurring and dissenting from the order, appear at 586 F.3d 649 and are reprinted in App. 62a-110a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on April 21, 2009. The Ninth Circuit denied the petitions for rehearing en banc on October 21, 2009. On January 15, 2010, Petitioners obtained an extension of time, up and until February 18, 2010, to file petitions for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

A.R.S. § 43-1089, which is the statute creating the tuition tax credit program at issue in this case, is too lengthy to include herein. Pursuant to Rule 10(1)(f), the full text of this statute is set out in the appendix at App. 112a-115a.

STATEMENT OF THE CASE

A. Factual Background

The facts material to the questions presented are simple and straightforward. In 1997, the Arizona Legislature enacted Ariz. Rev. Stat. § 43-1089, which allows Arizona taxpayers to donate private funds to a "school tuition organization" ("STO") of their choice. § 43-1089(A), App. 112a. The taxpayer may then claim a dollar-for-dollar credit on their state income tax for the amount donated, which is capped at $500 for individual filers and $1000 for married couples filing a joint return. §§ 43-1089(A)(1)-(3), App. 112a.

STOs are private, charitable, tax-exempt corporations. § 43-1089(G)(3), App. 115a. Anyone can form an STO. App. 85a. STOs are mandated by statute to donate a minimum of ninety percent of their income to children who attend private schools. § 43-1089(G)(2)-(3), App. 114a-115a. Any STO may provide scholarships to students to attend any school, and the only limitation is that they cannot provide scholarships to students of only one school. § 43-1089(G)(3), App. 115a. Parents are responsible for deciding which school their child attends, and applying for a scholarship from an appropriate STO. App. 86a.

Under Arizona's tax credit program, the private choices of taxpayers, the STOs, and parents direct tuition funds to students. App. 52a-53a. The taxpayer chooses to donate or not, and if he donates, to which STO. App. 52a. The privately formed, non-profit STOs raise money to award scholarships to schools of their choice. App. 52a-53a. Each parent is responsible for deciding which school his or her child attends, and which STO to apply to for a scholarship. App. 52a.

Finally, the Arizona Supreme Court, in *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999), authoritatively determined, as a matter of state law, that the funds generated by Arizona's tax credit are private money to which the state has no legal claim.

B. Procedural Background

Respondents filed this lawsuit in Arizona Federal District Court on February 15, 2000. The Complaint alleged that Arizona's tuition tax credit violated the Establishment Clause of the United States Constitution both on its face and as applied. App. 118a.[1]

The district court dismissed the Complaint pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The Ninth Circuit reversed that judgment. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002). This

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[1] At oral argument before the Ninth Circuit, the Respondents abandoned their facial challenge. App. 7a n.5.

Court affirmed that decision. *Hibbs v. Winn*, 542 U.S. 88 (2004).

Upon remand, the district court granted intervention to ACSTO, ASCT, and two parents whose children receive tax credit funded scholarships. The intervenors filed motions to dismiss the Complaint, and the State Defendant filed a motion for judgment on the pleadings. Taken together, the various filings argued that the Complaint should be dismissed because the Respondents lacked standing; the Respondents' Complaint failed to state an Establishment Clause claim upon which relief could be granted; and the Respondents' claims were decided by the Arizona Supreme Court in *Kotterman*, and thus barred by res judicata. On March 24, 2004, the district court granted ASCT, et al.'s motion to dismiss, holding that Respondents' Complaint failed to state a claim under the Establishment Clause because the tax credit was a program of true private choice in which money reached religious schools by way of "multiple layers of private choice." App. 52a. The Respondents timely appealed on April 22, 2005.

On April 21, 2009, the Ninth Circuit reversed the district court's dismissal, and remanded the case so the Respondents could pursue their as-applied challenge to Arizona's tax credit program. ACSTO, ASCT, et al., and the State Defendant filed timely petitions for rehearing en banc on May 14, 2009. The Ninth Circuit denied rehearing en banc on October 21, 2009. Judge O'Scannlain, writing for seven other judges, dissented from the denial of rehearing en

banc. Judge O'Scannlain stressed the national significance of the panel's decision, stating that it "casts a pall over comparable educational tax-credit schemes in states across the nation and could derail legislative efforts in four states within our circuit to create similar programs." App. 84a. Judge O'Scannlain concluded that the panel's decision "jeopardize[s] the educational opportunities of hundreds of thousands of children nationwide." App. 84a.

REASONS FOR GRANTING THE WRIT

Petitioner ACSTO concurs with the petitions for certiorari of the State Defendant and of Arizona School Choice Trust, *et al.*, and urges this Court to grant certiorari for the reasons stated therein.

Rather than reiterating the Establishment Clause arguments amply and aptly presented by ASCT and the State, ACSTO submits a separate petition urging the Court to grant certiorari for an additional reason not addressed in the State's or ASCT's petitions: that the Ninth Circuit erred in finding that the Respondent satisfied the requirements of taxpayer standing. The petition should be granted to address this issue, in addition to the Establishment Clause issues raised by the State and ASCT, because the Ninth Circuit's holding regarding the important federal question of taxpayer standing conflicts with decisions of this Court and of the Arizona Supreme Court in several ways.

First, the Ninth Circuit's finding of taxpayer standing conflicts with decisions of this Court holding that to establish taxpayer standing in the context of an Establishment Clause challenge, a plaintiff must allege "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). Respondents do not make any such allegation here, nor could they, since Arizona's tax credit program does not levy a tax or appropriate any money. It simply allows private citizens to donate their money to a charitable organization that grants tuition scholarships. The Ninth Circuit's holding that a taxpayer has standing to bring a federal lawsuit challenging private individuals' decisions on how to donate their own money directly conflicts with this Court's decisions, warranting review and reversal by this Court.

Second, the Ninth Circuit's finding of taxpayer standing conflicts with decisions of this Court stating that Article III standing requires an injury that is actual and concrete, not speculative or conjectural. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Respondents predicate their standing solely on the theory that Arizona's tax credit reduces the state's revenue. The problem with Respondents' theory is that their injury is inherently subjective and speculative. The impact of Arizona's tax credit on Arizona's tax revenue defies calculation. While the tax credit results in millions of dollars flowing to STOs in order to fund scholarships for private education each year, it also saves the

state millions of dollars each year by reducing the state's financial outlays for public education. It also likely creates new sources of tax income. The Ninth Circuit's finding that Respondents have standing marks an unwarranted expansion of Article III standing into the realm of speculative injuries, in direct conflict with decisions of this Court. Review and reversal by this Court is therefore warranted.

Third, the Ninth Circuit's opinion conflicts with this Court's frequent holding that federal courts are bound by authoritative interpretations of state law by a state's highest court. In finding that Respondents have taxpayer standing, the Ninth Circuit disregarded the Arizona Supreme Court's holding in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) that, under Arizona state law, the funds flowing to school tuition organizations are private monies. Rather than follow this holding, the Ninth Circuit supplanted it with its own view that Arizona's tax credit involves the allocation of state funds. The Ninth Circuit's opinion thus directly conflicts with decisions of the Arizona Supreme Court and this Court, and review and reversal by this Court is warranted.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE ALLEGATIONS NECESSARY TO CONFER TAXPAYER STANDING.

This Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968), created an exception in certain types of Establishment Clause cases to the general rule that

"state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *DaimlerChrysler Corporation v. Cuno*, 547 U.S. 332, 346 (2007). Recent decisions of this Court have stressed that "the *Flast* exception has a 'narrow application in our precedent,' that only 'slightly lowered' the bar on taxpayer standing, and that must be applied with 'rigor.'" *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 609 (2007) (citations omitted).

Under *Hein*, *Flast* and *DaimlerChrysler*, to establish standing a taxpayer-plaintiff must show that the state has extracted taxes from them, or has appropriated and spent public monies, to fund a program that allegedly violates the Establishment Clause. For example, in *Hein*, the Court held that the plaintiffs lacked standing to challenge the use of tax money by the Executive Branch of the federal government to pay for religious conferences and speeches. 551 U.S. at 605. The plaintiffs in *Hein* argued for a broad interpretation of *Flast*, stating that *Flast* confers standing where "any 'expenditure of government funds in violation of the Establishment Clause'" is challenged. *Id.* at 603. But this Court rejected this interpretation, instead holding that only "expenditures . . . made pursuant to an express congressional mandate and a specific congressional appropriation" satisfied *Flast*'s standing requirements. *Id. Accord DaimlerChrysler*, 547 U.S. at 348 (observing that the taxpayer injury that satisfies standing in Establishment Clause cases is "the very 'extract[ion] and spend[ing]' of 'tax

money' in aid of religion" (quoting *Flast*, 392 U.S. at 106)).

In fact, as far back as 1952, this Court held that a taxpayer challenging a practice under the Establishment Clause must allege "a good-faith pocketbook action" in which there is a "direct dollars-and-cents injury." *Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952). This requires a taxpayer-plaintiff to show "a measurable appropriation or disbursement of [public] funds occasioned solely by the activities complained of." *Id.* The taxpayer-plaintiff in *Doremus* lacked standing because he could not show that any tax funds had been spent on the school's practice of having the Bible read at the beginning of each school day. In rejecting plaintiff's standing, the Court said that he, like Respondents here, was seeking to litigate a "grievance [that] is not a direct dollars-and-cents injury but is a religious difference." *Id.*

Respondents lack taxpayer standing here for the same reason this Court rejected standing in *Hein* and *Doremus*. Nowhere in the Complaint do Respondents allege, nor could they, that taxpayer funds have been extracted from them, or otherwise appropriated, and spent, to implement Arizona's tuition tax credit program.[2] Indeed, the challenged

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[2] In fact, as discussed in § III, *infra*, the Arizona Supreme Court decided in *Kotterman*, 972 P.2d at 618, that the money that flows to STOs as a result of Arizona's tax credit is private, not public, money. This holding, with which the Ninth Circuit's

program does not levy any tax upon the Respondents, nor does it appropriate public funds, to be used to support religious education. Rather, it offers taxpayers the choice of taking a tax credit so they may voluntarily donate their money to support charitable organizations of their choosing. How much money, and to which STOs and students it goes, are decisions made by private taxpayers and parents, not by the legislature.

Put simply, any effect upon Arizona's tax revenues (and Respondents' claims regarding the alleged effect are entirely speculative and thus insufficient to confer standing, *see* § II, *infra*), results solely from individual taxpayers making private, independent choices to avail themselves of tax credits. The legislature has appropriated no sum of money to fund its program, nor taxed the Respondents to support it. Respondents therefore lack taxpayer standing under this Court's precedent, and the Ninth Circuit's finding to the contrary is in conflict with that precedent.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT STATING THAT A SPECULATIVE AND CONJECTURAL INJURY CANNOT CONFER ARTICLE III STANDING.

In their Complaint, Respondents expressly admit that their taxpayer standing argument is not based on the traditional and required "tax and spend"

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decision directly conflicts, forecloses any argument that the tax credit diverts state tax funds to religious schools.

injury. Rather, Respondents predicate their standing argument solely on the theory that Arizona's tax credit program diminishes the State's revenues. App. 126a ("Plaintiffs and other Arizona taxpayers have been, and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program described above"). In addition to conflicting with the requirements of *Hein*, *Flast*, *Doremus*, and *DaimlerChrysler* set out *supra*, the Ninth Circuit's acceptance of Respondents' standing theory also conflicts with this Court's decisions regarding the prerequisites for Article III standing.

Article III requires a taxpayer-plaintiff to demonstrate a "concrete and particularized" injury, that is "actual or imminent," not "conjectural or hypothetical." *DaimlerChrysler*, 547 U.S. at 344. *See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 480 n.17 (1982) (noting that "any connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent"). A mere grievance that the taxpayer "suffers in some indefinite way in common with people generally" is insufficient. *DaimlerChrysler*, 547 U.S. at 344.

The plaintiffs in *DaimlerChrysler* challenged a state tax credit provided to the DaimlerChrysler corporation to induce it to keep a manufacturing plant within the State. *Id.* at 337-38. Like the Respondents here, the plaintiffs in *DaimlerChrysler* based their standing to sue on the alleged reduced State and city revenue that resulted from the tax

credit. *Id.* at 339. The *DaimlerChrysler* plaintiffs' standing argument is indistinguishable from Respondents' argument, as they also claimed that the tax credit "'depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments' and thus 'diminish[es] the total funds available for lawful uses and impos[es] disproportionate burdens on' them." *Id.* at 342-43 (quoting plaintiffs' brief on appeal).

DaimlerChrysler identified two ways in which the plaintiffs claimed "reduced revenue" injury was speculative in nature, and thus insufficient to establish Article III standing. First, it was pure speculation how the challenged tax credit would impact the State treasury. As this Court said, "[I]t is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues." *Id.* at 344.

The same logic undermines Respondents' "reduced revenue" injury here. Like the tax credit involved in *DaimlerChrysler*, the economic impact of Arizona's tuition tax credit on the State treasury requires too much conjecture and hypothesizing to support Article III standing. Indeed, this Court has recognized that state programs aimed at increasing educational choice by making private school more affordable likely decrease a state's tax burden: "By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers." *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

In addition to reducing the State's financial burden in providing public education, the tax credits at issue here, like the credits in *DaimlerChrysler*, also likely create other sources of state revenue. For example, Arizona's tax credit likely has increased the number of teaching, administrative, and management positions open at already existing private schools, and also has likely led to the establishment of new private schools in the State. This increase in economic activity correlates to numerous new sources of tax revenues for the State. Put simply, the Respondents' claim that the tax credit diminishes the state treasury is purely speculative and thus is too hypothetical and remote of an "injury" to confer Article III standing.

In finding that Respondents had standing, the Ninth Circuit made the same mistake as Respondents: it only looked at one side of the ledger. The Ninth Circuit stressed that taxpayer donations to STOs had increased significantly since the program's inception, noting that in its first year (1998) Respondents' alleged that taxpayer's claimed $1.8 million in credits while in 2007 the Arizona Department of Revenue reported that taxpayers claimed $54 million in credits. App. 11a-12a n.7. But as *Daimler Chrysler* makes clear, Respondents' "reduced revenue" theory of standing cannot be evaluated by focusing myopically on the credits taken. The other side of the ledger—made up of, *inter alia*, tax savings from reduced public education costs and new sources of tax income created by the program—must also be taken into account.

And, of course, whether tax revenues have actually decreased as a result of the tuition tax credit program is a highly subjective matter, depending largely on how one analyzes the available financial data. For instance, Respondents rely on a Goldwater Institute study of the Arizona tax credit to argue that the credit results in a loss of revenue to the State. Carrie Lukas, *The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students*, Goldwater Institute Policy Report # 186, Dec. 11, 2003, http://www.goldwaterinstitute.org/article/1204. However, a 2008 study of the program found that "the Private School Tuition Tax Credit saves Arizona taxpayers somewhere from $99.8 to $241.5 million due to students enrolling in private rather than public school," while taxpayer donations amounted to only $55.3 million dollars. Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, at 1, http://archive.constantcontact.com/fs035/1011047932616/archive/1102832763902.html. These dueling studies regarding the impact of the tax credit on Arizona's revenue highlight the inherent uncertainty and subjectivity in Respondents' "reduced revenue" standing theory, and it simply cannot confer Article III standing.

DaimlerChrysler provided a second reason why the plaintiffs' alleged injury in that case was "conjectural and hypothetical" which is also applicable here. This Court explained that plaintiffs' alleged injury depended "on how legislators respond to a reduction in revenue, if that is the consequence of the credit." 547 U.S. at 344. The Court expounded:

> Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing.

Id. (emphasis added). Here, the Plaintiffs have not even alleged that their tax burden has increased as a result of Arizona's tax credit. Even if they did, that allegation would not support standing because their alleged tax increase would be no more than pure speculation regarding the impact of Arizona's tuition tax credit on the State treasury.

Further, as the above quote highlights, Respondents likewise have a problem with the redressability prong of Article III standing. Like the plaintiffs in *DaimlerChrysler*, the Respondents seek to have the tax credit they are challenging enjoined. However, *DaimlerChrysler* points out several reasons why such an injunction would not have provided plaintiffs redress in that case. First, since the "very point of tax benefits is to spur economic activity, which in turn *increases* government revenues," it was not clear that an injunction would remedy the alleged depletion of tax revenue. *Id.* at 344. Second, the Court stated it was pure speculation to assume that abolishing the tax credit

would result in the State passing the supposed increased revenue on to taxpayers in the form of tax reductions. *Id.* The same fatal flaws exist as to Respondents' claim that an injunction against Arizona's tax credit will redress their alleged injury.

III. THE NINTH CIRCUIT'S CONCLUSION THAT THE TAX CREDIT FUNDS ARE PUBLIC FUNDS CONFLICTS WITH DECISIONS OF THE ARIZONA SUPREME COURT AND THIS COURT.

This Court has long held that "state courts are the ultimate expositors of state law" and that federal courts are therefore "bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). *Accord Cunningham v. California*, 549 U.S. 270, 306 n.8 (2007) ("California Supreme Court's exposition of California law is authoritative and binding on this Court"); *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (*per curiam*) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts"); *Ring v. Arizona*, 536 U.S. 584, 603 (2002) (recognizing the Arizona Supreme Court's construction of Arizona sentencing law as authoritative).

This line of case law is applicable here because determining whether Respondents can establish taxpayer standing depends on whether the money flowing to the beneficiaries of Arizona's tax credit is private or public money. This is a question of state law on which the Arizona Supreme Court has authoritatively spoken: the funds that flow to STOs

and ultimately to children in the form of tuition scholarships, is private, not public, money. As the *Kotterman* court said:

> [N]o money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

972 P.2d at 618.

Kotterman involved a challenge to the same tax credit program that is at issue here based on the federal Establishment Clause and the Arizona Constitution's Religion Clauses. The *Kotterman* Court's holding that the money contributed to STOs is private money was central to its holding that the program did not violate either the federal or state constitutions. Further, this holding constitutes an authoritative interpretation of state law regarding the nature of the funds generated by Arizona's tax credit. The Ninth Circuit's opinion directly conflicts with *Kotterman*, and with the rule that a state supreme court's interpretation of state law is binding on federal courts, by supplanting *Kotterman*'s interpretation of Arizona law with its view that Arizona's tax credit "'channel[]s . . . [state] assistance' to private organizations." App. 12a.

Importantly, the *Kotterman* decision rejects each of the Ninth Circuit's findings supporting its contrary view that the money involved here is public money. For example, the Ninth Circuit found that the tax credits allowed under Arizona's program are public money because they are deducted after tax liability has been calculated:

> Tax credits are deducted *after* taxpayers' tax liability has been calculated, thereby giving taxpayers dollar-for-dollar "credits" against their state taxes for sums paid to STOs. Tax credits therefore operate differently from tax deductions; whereas tax deductions allow taxpayers only to reduce their income subject to taxation, tax credits allow individuals to make payments to a third party *in satisfaction of* their assessed tax burden.

App. 11a.

The *Kotterman* court directly addresses and rejects this view:

> For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before. . . . We believe that such a conclusion is both artificial and premature. It is far more reasonable to

> say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government, and upon which the state has a legal claim.

972 P.2d at 618.

The Ninth Circuit also supported its finding that Arizona's tax credit involves public money by claiming that if the money is not donated to an STO it would otherwise be state revenue. App. 14a ("[T]he state legislature has provided only two ways for this money to be spent: taxpayers will either give the dollar to the state, or that dollar . . . *will* end up in scholarships for private school tuition"). Again, *Kotterman* rejected this line of reasoning:

> Petitioners suggest . . . that because taxpayer money could enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts quasi-ownership over it. This expansive interpretation is fraught with problems. Indeed, under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature.

972 P.2d at 618.

Finally, the Ninth Circuit stated that the tax credit operates "as if the state had given each taxpayer a $500 dollar check that can only be

endorsed over to a STO or returned to the state." App. 13a. The quotes from *Kotterman* above directly contradict this finding. Likewise, *Kotterman* rejected the view that "reducing a taxpayer's liability is the equivalent of spending a certain sum of money." 972 P.2d at 620.

The Ninth Circuit asserts that *Kotterman* "has no bearing on [its] analysis of plaintiffs' standing in federal court" because *Kotterman* dealt with whether the tax credit "constitute[s] an 'appropriation of public money' within the meaning of" Arizona's Religion Clauses. App. 12a n.8. But *Kotterman* is not so limited. Indeed, *Kotterman*'s holding that tax credits constitute private money draws from several Arizona cases unrelated to the State constitution's Religion Clauses. *See Kotterman*, 972 P.2d at 617 (relying upon cases dealing with state employee retirement benefits, payments by university regents, and contracts between state agencies and tribal government). Further, *Kotterman*'s adoption of the view that tax credits are not public money because "funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government," *id.* at 618, demonstrates that, under Arizona law, tax credits generally (and the tuition tax credits involved here, specifically) are private, not public, money. Additionally, the Ninth Circuit is simply incorrect that the tax credit funds morph between public and private depending on what legal question is being analyzed. The funds are either public or private under Arizona law, and *Kotterman* authoritatively decided that the tax credit funds are private.

Kotterman is an authoritative interpretation of state law regarding the nature of the funds generated by Arizona's tax credit program and is binding on the federal courts. Further, its holding that these funds are private defeats Respondents' standing to sue. No public money is involved, so Respondents are unable to allege the required injury: the extracting and spending of public tax dollars in aid of religion. *See* § I, *supra*. The Ninth Circuit's holding that Respondents have taxpayer standing is predicated on its holding that the tax credit funds constitute public funds. This holding is in direct conflict with the Arizona Supreme Court's interpretation of state law, and with this Court's precedent stating that federal courts are bound by such determinations.

CONCLUSION

For the foregoing reasons, and for the reasons specified in ASCT and the State Defendant's petitions, Petitioner ACSTO respectfully requests that this Court grant review.

Respectfully submitted,

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February 18, 2010

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, an Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer LYNN HOFFMAN, an Arizona taxpayer, *Plaintiffs-Appellants,* v. ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD, *Defendants-Appellees.*	No. 05-15754 D.C. No. CV-00-00287-EHC OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
January 24, 2008—Pasadena, California

Filed April 21, 2009

Before: Dorothy W. Nelson, Stephen Reinhardt and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

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Benjamin W. Bull, Gary S. McCaleb, Jeremy D. Tedesco, Alliance Defense Fund, Scottsdale, Arizona, for intervenor-defendant-appellee Arizona Christian School Tuition Organization.

OPINION

FISHER, Circuit Judge:

Arizona law grants income tax credits restricted to taxpayers who make contributions to nonprofit organizations that award private school scholarships to children. Plaintiffs, certain Arizona taxpayers, allege that some of the organizations funded under this program restrict the availability of their scholarships to religious schools, and that the program in effect deprives parents, the program's aid recipients, of a genuine choice between selecting scholarships to private secular schools or religious ones. We conclude that the plaintiffs' complaint, which at this stage of the litigation we must view in the light most favorable to the plaintiffs, sufficiently alleges that Arizona's tax-credit funded scholarship program lacks religious neutrality and true private choice in making scholarships available to parents. Although scholarship aid is allocated partially through the individual choices of Arizona taxpayers, overall the program in practice "carries with it the *imprimatur* of government endorsement." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). We therefore hold, contrary to the district court, that plaintiffs' allegations, if accepted as true, are sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause of the United States Constitution.

BACKGROUND

Plaintiffs allege that Arizona's Revised Statute § 43-1089 ("Section 1089"), as applied, violates the Establishment Clause of the First Amendment. Section 1089, first enacted by the Arizona legislature in 1997, gives individual taxpayers a dollar-for-dollar tax credit for contributions to "school tuition organizations" ("STOs").[1] A STO is a private nonprofit organization that allocates at least 90 percent of its funds to tuition grants or scholarships for students enrolled in "a nongovernmental primary or secondary school or a preschool for handicapped students" within the state. Ariz. Rev. Stat. Ann. § 43- 1089(G)(2)-(3) (2005).[2] STOs may not provide scholarships to schools that "discriminate on the basis of race, color, handicap, familial status or national origin," but nothing in the statute precludes STOs from funding scholarships to schools that provide religious instruction or that give admissions preferences on the basis of religious affiliation. *Id.* § 1089(G)(2). Individual taxpayers can claim a tax credit of up to $500 for such contributions and married couples filing jointly can claim a credit of up to $1,000, provided the allowable tax credit does not exceed the taxes otherwise due. *Id.* § 1089(A)- (B). Taxpayers may designate their contribution to a

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[1] A parallel statute, which plaintiffs do not challenge in this action, gives corporations a dollar-for-dollar tax credit for contributions to STOs. *See* Ariz. Rev. Stat. § 43-1183

[2] Hereinafter, all cites to "Section 1089" refer to Arizona Revised Statute Annotated § 43-1089 (2005). Any differences between this current version of Section 1089 and the version in place as of February 2000, when plaintiffs' complaint was filed, are not significant for the purposes of our analysis.

STO that agrees to provide a scholarship to benefit a particular child, so long as the child is not the taxpayer's own dependent. *Id.* § 1089(E). The tax credit is available to all taxpayers in Arizona, regardless of whether they are parents of school-age children or pay any private school tuition themselves.

Section 1089 requires STOs to provide scholarships or tuition grants to children "to allow them to attend *any* qualified school of their parents' choice," but also states that STOs may not provide scholarships while "limiting availability to only students of one school." *Id.* § 1089(G)(3) (emphasis added). On its face, then, Section 1089 could have been interpreted to require all STOs to provide scholarships to any qualified private school in the state, or to permit STOs to provide scholarships to a limited set of schools, so long as that set was greater than one. In practice, plaintiffs allege, many STOs have opted to limit the schools to which they offer scholarships, and a number of STOs provide scholarships that may be used only at religious schools or schools of a particular denomination. For example, plaintiffs allege that Arizona's three largest STOs, as measured by the amount of contributions reported in 1998, each restricts its scholarships to use at religious schools. The largest of these, the Catholic Tuition Organization of the Diocese of Phoenix, restricts its scholarships to use at Catholic schools in the Phoenix Diocese such as St. Mary's, which advertises its mission as being "to provide a quality Catholic education by developing and sustaining a rich tradition grounded in Gospel

and family values." The second largest STO, the Arizona Christian School Tuition Organization, expressly restricts scholarships to use at "evangelical" Christian Schools. The third largest, Brophy Community Foundation, restricts its scholarships to use at two Catholic schools, one of which advertises its goal to be "instill[ing] a knowledge of the truths of faith, enlightened by the post-Conciliar teachings of the Church," and the other of which promotes itself as offering students "an intimate relationship with God" through "the process of nurturing the soul."

Arizona does not specify scholarship eligibility criteria or dictate how STOs choose the students who receive scholarships, and STO provided scholarships therefore vary considerably. Although STOs may choose to award scholarships primarily based on financial need, Section 1089 does not require it. The availability of scholarships to particular students and particular schools thus depends on the amount of funding a STO receives, the range of schools to which it offers scholarships and the STO's own scholarship allocation decisions and eligibility criteria. Therefore, plaintiffs allege, because the largest STOs restrict their scholarships to sectarian schools, students who wish to attend non-religious private schools are disadvantaged in terms of the STO-provided scholarships available to them. Thus, plaintiffs argue, the disparities in the availability and amount of scholarships for use at religious and secular schools show that the structure of Section 1089, as applied, favors religious over secular

schools, and thereby violates the Establishment Clause.

Before Section 1089 became operative, the Arizona Supreme Court, based on its construction of the statute, held that it did not on its face violate the Establishment Clause or provisions of the Arizona state constitution. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (en banc).[3] After the statute took effect, different plaintiffs filed this suit against the Director of Arizona's Department of Revenue in the United States District Court for the District of Arizona.[4] Plaintiffs do not contest the facial validity of Section 1089, but rather assert that it violates the Establishment Clause as applied.[5] The district court dismissed the suit as barred by the Tax Injunction Act. *See Winn v. Killian*, 307 F.3d 1011, 1013 (9th

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[3] Significantly, in rejecting the facial challenge, the Arizona Supreme Court interpreted Section 1089 to require that "[e]very STO must allow its scholarship recipients to 'attend *any* qualified school of their parents' choice,' and may not limit grants to students of only one such institution." *Id.* at 614 (quoting Ariz. Rev. Stat. Ann. § 43-1089(E)(2) (2005) (emphasis added)). "Thus," the Arizona Supreme Court concluded, "schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents." *Id.* Because plaintiffs in this action allege that, in practice, Section 1089 permits STOs to restrict the use of their scholarships to *certain* schools, the structure of the program as applied is notably different from the program's structure as it was considered in *Kotterman*.

[4] Current Director Gale Garriott has since replaced former Director Mark Killian as the named defendant.

[5] Plaintiffs' complaint alleged that Section 1089 is invalid both on its face and as applied, but they have since abandoned their facial challenge.

Cir. 2002). We reversed the dismissal, *see id.* at 1020, and the Supreme Court affirmed our decision. *See Hibbs v. Winn*, 542 U.S. 88, 112 (2004). On remand, the district court allowed two STOs, the Arizona Christian School Tuition Organization ("ACSTO") and Arizona School Choice Trust ("ASCT"), and two parents of ASCT scholarship recipients, Glenn Dennard and Luis Moscoso, to intervene as defendants. ACSTO provides scholarships only to religious schools and the ASCT provides scholarships to any private school of the parents' choice.[6] Defendants again moved to dismiss, contending that plaintiffs lacked standing, that the suit was barred by res judicata and that plaintiffs had failed to state a claim under the Establishment Clause. The district court granted defendants' motion to dismiss for failure to state a claim and plaintiffs appealed. We have jurisdiction under 28 U.S.C. § 1291 and we reverse and remand for further proceedings.

STANDARD OF REVIEW

We review the district court's dismissal for failure to state a claim de novo, "accept[ing] all factual allegations in the complaint as true and construe[ing] the pleadings in the light most

[6] We use the term "defendants" to refer to the Director of Arizona's Department of Revenue and the intervening defendants ACSTO, ASCT, Dennard and Moscoso. We use the term "defendant-intervenors" when referring only to the intervening defendants. At oral argument, plaintiffs stipulated that they challenge only those STOs that restrict scholarships to religious schools, and thus we note that ASCT is not being directly challenged.

favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We affirm the district court "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998) (internal quotation marks omitted). "Standing is a question of law that we review de novo." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1224 (9th Cir. 2008).

ANALYSIS

I. Taxpayer Standing

[1] Plaintiffs' only allegation of injury from the allegedly unconstitutional operation of Section 1089 arises from their status as Arizona taxpayers. It is well established that individuals do not generally have standing to challenge governmental spending solely because they are taxpayers, because "it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm." *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007) (plurality opinion). This rule applies with equal force to taxpayer suits challenging an allegedly unconstitutional state action and those challenging federal action. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-49 (2006); *Arakaki v. Lingle*, 477 F.3d 1048, 1062-63 (9th Cir. 2007). The Supreme Court, however, has long recognized "a narrow exception to the general constitutional prohibition against taxpayer standing" when a

plaintiff contends that a use of funds violates the Establishment Clause. *Hein*, 127 S. Ct. at 2564; *see Flast v. Cohen*, 392 U.S. 83, 88 (1968). Because plaintiffs have alleged that the state has used its taxing and spending power to advance religion in violation of the Establishment Clause, we hold that they have standing under Article III to challenge the application of Section 1089.

[2] As the Supreme Court recently reaffirmed, the *Flast* exception to the general bar against taxpayer standing is rooted "in the history of the Establishment Clause" and is designed to prevent " 'the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.' " *DaimlerChrysler*, 547 U.S. at 348 (alterations in original) (quoting *Flast*, 392 U.S. at 103). The exception recognizes that the "injury" alleged in Establishment Clause challenges to governmental spending arises not from the effect of the challenged program on the plaintiffs' own tax burdens, but from "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion." *Id.* (alterations in original) (quoting *Flast*, 392 U.S. at 106). Therefore, to satisfy the *Flast* test for taxpayer standing, plaintiffs need not show that an injunction against a particular taxing or spending program would cause "lawmakers . . . [to] dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *Id.* at 348-49. Instead, they need only show that the program challenged involves "a sufficient nexus between the taxpayer's standing as a taxpayer and the . . . [legislative] exercise of

taxing and spending power." *Bowen v. Kendrick*, 487 U.S. 589, 620 (1988).

[3] Section 1089 gives Arizona taxpayers a tax credit for amounts they donate to STOs, up to the statutory cap of $500 for individuals or $1,000 for married couples filing jointly or the taxpayers' entire state tax liability. *See* Ariz. Rev. Stat. Ann. § 43-1089(A), (C). Tax credits are deducted *after* taxpayers' tax liability has been calculated, thereby giving taxpayers dollar-for-dollar "credits" against their state taxes for sums paid to STOs. Tax credits therefore operate differently from tax deductions; whereas tax deductions allow taxpayers only to reduce their income subject to taxation, tax credits allow individuals to make payments to a third party *in satisfaction of* their assessed tax burden. As the Supreme Court explained, "[i]n effect, § 43-1089 gives Arizona taxpayers an election" to direct a portion of the money they owe the state to either a STO or to the Arizona Department of Revenue. *Hibbs*, 542 U.S. at 95. Accordingly, "[a]s long as donors do not give STOs more than their total tax liability, their . . . contributions are costless." *Id.* Tax credits are therefore a powerful legislative device for directing money to private organizations.[7]

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[7] Section 1089's success is evident from the year-over-year increases in contributions since the program took effect. Plaintiffs allege that taxpayers claimed $1.8 million in credits for contributions to STOs in 1998, when the program was under legal challenge that made it unclear whether donors would receive the credit, and over $5.9 million in 1999. According to data on the Arizona Department of Revenue's public website, these contributions appear to have further increased since the filing of plaintiffs' complaint, with

Defendant-intervenors argue that plaintiffs do not have standing to challenge Section 1089 even under the *Flast* exception, because the money directed by taxpayers to STOs under the tax credit program does not pass through the state treasury and therefore the program cannot be characterized as involving any "expenditure" of public funds.[8] The Supreme Court has recognized, however, that state tax policies such as tax deductions, tax exemptions and tax credits are means of "channeling . . . [state] assistance" to private organizations, which can have "an economic effect comparable to that of aid given directly" to the organization. *Mueller v. Allen*, 463 U.S. 388, 399 (1983). The Court has therefore refused to make artificial distinctions between direct grants to religious organizations and tax programs that confer special benefits on religious organizations, particularly tax credits such as the

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taxpayers claiming credits worth over $54 million in 2007. *See* Arizona Department of Revenue Office of Economic Research & Analysis, Individual Income Tax Credit for Donations to Private School Tuition Organizations, 2007, at 3 (April 1, 2008), *available at http://www.revenue.state.az.us/Research Stats/private_schl_credit_report_2007.pdf* (last visited April 13, 2009).

[8] ACSTO's argument that our reasoning is bound by *Kotterman*'s conclusion that the tax credit does not constitute an "appropriation of public money" within the meaning of the Article II, Section 12 and Article IX, Section 10 of the Arizona constitution, *see* 972 P.2d at 617-21, is meritless. The Arizona Supreme Court's holding has no bearing on our analysis of plaintiffs' standing in federal court, which turns on the requirements derived from Article III of the U.S. Constitution. *Cf. Hein*, 127 S. Ct. at 2562 ("One of the controlling elements in the definition of a case or controversy under Article III is standing.") (internal quotation marks and alterations omitted).

one challenged here. As the Court noted, "for purposes of determining whether such aid has the effect of advancing religion," it makes no difference whether the qualifying individual "receives an actual cash payment . . . [or] is allowed to reduce . . . the sum he would otherwise be obliged to pay over to the state." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 790-91 (1973). In either case, "the money involved represents a charge made upon the state for the purpose of religious education." *Id.* at 791 (internal quotation marks omitted); *see also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting) ("Our opinions have long recognized — in First Amendment contexts as elsewhere — the reality that tax exemptions, credits, and deductions are a form of subsidy that is administered through the tax system.") (internal quotation marks omitted). In effect, Section 1089 works the same as if the state had given each taxpayer a $500 check that can only be endorsed over to a STO or returned to the state. Because Section 1089 does not allow taxpayers to keep the money under any circumstance — and because it directs how the money will be spent if it is *not* surrendered to the state — we reject the suggestion that this money is not publicly subsidized simply because it does not pass through the treasury.

Nor does Section 1089 lack "a sufficient nexus between the taxpayer's standing as a taxpayer and the . . . [legislative] exercise of taxing and spending power" just because the Arizona legislature does not transfer money to STOs or religious schools directly.

See Bowen, 487 U.S. at 620. The Arizona legislature promulgated Section 1089 under the power conferred by Article IX of the Arizona constitution, a provision that is equivalent to the U.S. Constitution's taxing and spending clause. *See* Ariz. Const. art. IX, § 3. By giving taxpayers a dollar-for-dollar credit for contributions to STOs and then requiring STOs to "allocate[ ] at least ninety percent of . . . [their] annual revenue for educational scholarships or tuition grants to children," the state legislature has provided only two ways for this money to be spent: taxpayers will either give the dollar to the state, or that dollar (or at least 90 percent of it, after allowable STO administrative expenses) *will* end up in scholarships for private school tuition. *See* Ariz. Rev. Stat. Ann. § 1089(G)(3) (2005).

[4] By structuring the program as a dollar-for-dollar tax credit, the Arizona legislature has effectively created a grant program whereby the state legislature's funding of STOs is mediated through Arizona taxpayers. The Court has recognized that taxpayer standing exists even when a legislature does not directly allocate funds to religious organizations, but instead mediates the funds through another agency. *See Bowen*, 487 U.S. at 618-20. Although the Arizona legislature has chosen an alternative method of allocating the funds that Section 1089 makes available to STOs, the Court clarified in *Bowen* that it was the legislature's exercise of its taxing and spending power, rather than the actions of the agency, that permitted taxpayers to raise an Establishment Clause challenge. *See id.* at 619 ("We do not think . . . that

appellees' claim that . . . [appropriated] funds are being improperly used by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [of Health and Human Services]."). Accordingly, under *Bowen*, taxpayers have standing to challenge a legislature's exercise of its taxing and spending power even when the legislature does not use that power to directly fund religious organizations, but instead uses the power to authorize third parties to fund such organizations.

[5] Consistent with these principles, the Supreme Court has repeatedly decided Establishment Clause challenges brought by state taxpayers against state tax credit, tax deduction and tax exemption policies, without ever suggesting that such taxpayers lacked Article III standing. *See, e.g.*, *Mueller*, 463 U.S. at 390 (state income tax deduction for school expenses that could be claimed for expenses at religious schools); *Nyquist*, 413 U.S. at 789-90 (hybrid state tax deduction-tax credit program for tuition paid to private schools); *Hunt v. McNair*, 413 U.S. 734, 737-38 (1973) (state tax exemption for state-issued revenue bonds that went in part to religious schools); *Walz v. Tax Comm'n*, 397 U.S. 664, 666 (1970) (state property tax exemption for religious nonprofit organizations). The Supreme Court has also repeatedly decided challenges brought by state taxpayers to indirect aid programs – where the ultimate decision to confer aid rested with a private individual and not the

government — and again never suggested that taxpayers lacked standing. *See, e.g.*, *Zelman*, 536 U.S. at 645 (state tuition grants to parents for public or private schools); *Nyquist*, 413 U.S. at 781 (state tuition grants to parents for private schools). Although we acknowledge that "the [c]ourt's exercise of jurisdiction . . . is not precedent for the existence of jurisdiction," *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) (internal quotation marks omitted; alteration in original), we also note that the Court has rejected the suggestion that its consistent past practice of exercising jurisdiction amounts to "mere 'sub silentio holdings' " that "command no respect," *Hibbs*, 542 U.S. at 94. We therefore hold that plaintiffs have standing as taxpayers to challenge Section 1089 for allegedly violating the Establishment Clause.

II. The Establishment Clause

[6] "The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[9] *Zelman*, 536 U.S.

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[9] Defendants argue that plaintiffs' as-applied challenge is barred by "res judicata" in light of *Kotterman*. In *Hibbs v. Winn*, however, the Supreme Court observed that "*Kotterman*, it is undisputed, has no preclusive effect on the instant as-applied challenge to § 43-1089 brought by different plaintiffs." 542 U.S. at 95. Insofar as we are free to call this observation into question, we nonetheless find defendants' argument unpersuasive.

Under the full faith-and-credit statute, 28 U.S.C. § 1738, "[w]e give to a state-court judgment the same preclusive effect

at 648-49 (citing *Agostini v. Felton*, 521 U.S. 203, 222- 23 (1997)).

A. Secular Purpose

The first prong of this standard requires us to consider whether the statute was "enacted for . . . [a] valid secular purpose." *Id.* at 649. "[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a

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as would be given that judgment under the law of the State in which the judgment was rendered." *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 688 (9th Cir. 2004) (internal quotation marks omitted). *Kotterman* upheld Section 1089 on a facial challenge before the statute was implemented. Plaintiffs allege that Section 1089 violates the Establishment Clause because STOs have not provided scholarships in a way that is neutral toward religion and that offers parents true private choice; this allegation is predicated on evidence that was not available prior to Section 1089's implementation. Plaintiffs' as-applied challenge thus does not, as defendants argue, implicate Arizona's doctrine of virtual representation. *See El Paso Natural Gas Co. v. State*, 599 P.2d 175, 178 (Ariz. 1979). Arizona law bars cases under res judicata only where "*no additional evidence* is needed to prevail in the second action than that needed in the first." *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 934 P.2d 801, 804 (Ariz. App. 1997) (emphasis added). In determining whether a program's secular purpose is genuine, and whether a program has the primary effect of advancing religion, we may consider additional evidence as to how the program operates in reality. *See, e.g., McCreary County, Ky. v. ACLU*, 545 U.S. 844, 862 (2005) (holding the "implementation of the statute, or comparable official act" are relevant in examining a program's secular purpose (internal quotation marks omitted)). We therefore agree with the Supreme Court that "*Kotterman* . . . has no preclusive effect on the instant as-applied challenge . . . ." *Hibbs*, 542 U.S. at 95.

religious objective." *McCreary County, Ky v. ACLU*, 545 U.S. 844, 864 (2005).

[7] The legislative history of Section 1089 shows that its primary sponsor's concern in introducing the bill was providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents. *See* Ariz. House of Rep. Comm. on Ways & Means, Minutes of Meeting, Tues. Jan. 21 1997. Plaintiffs do not contest that this purpose, if genuine, is both secular and valid. Plaintiffs argue, however, that Section 1089's design and scope reveal this purpose to be a sham. Specifically, plaintiffs argue that Section 1089's operation shows that the program, which provides aid only to students who attend private schools, was enacted not to give low-income children a meaningful opportunity to attend those schools, but to advance the legislature's religious aims.

[8] Plaintiffs are correct that the nature of a program's operation may, in some instances, reveal its ostensible purpose to be a sham. *See McCreary*, 545 U.S. at 862 (stating that, in some cases, "the government action itself bespoke the purpose" of a program that violated the Establishment Clause) (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963)). As the Court held in *McCreary*, the inquiry whether a program's putative purpose is genuine and "not merely secondary to a religious objective," *id.* at 864, is undertaken from the perspective of "an 'objective observer,' one who takes account of the traditional external signs that

show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (internal quotation marks omitted)). Plaintiffs' allegations concerning Section 1089's operation are therefore relevant to whether the program has a genuine secular purpose. As we discussed above, for example, Section 1089 could, on its face, be interpreted to require each STO to provide scholarships for use at any qualified private school, religious or secular. Plaintiffs allege, however, that in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools. Such allegations, if proved, could belie defendants' claim that Section 1089 was enacted primarily to provide Arizona students with equal access to a wide range of schooling options.

[9] At the same time, we are mindful of the Supreme Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller*, 463 U.S. at 394-95. The Court has held that programs that direct benefits *exclusively* to private schools, as Section 1089 does, may be "adequately supported by legitimate, nonsectarian interests," including "promoting pluralism and diversity among [the state's] public and nonpublic schools." *Nyquist*, 413 U.S. at 773. The question before us, however, is not whether Section 1089 in fact has a genuine, secular purpose, but whether plaintiffs could prove, on the facts alleged in the complaint, that it does not. Accordingly, we conclude

that plaintiffs' allegations, if accepted as true, leave open the possibility that plaintiffs could reveal the legislature's stated purpose in enacting Section 1089 to be a pretense.

B. Effect

We next consider whether Section 1089 "has the forbidden 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 649. In "refin[ing] the definition of governmental action that unconstitutionally advances religion," the Supreme Court has "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989). Guided by the Court's opinion in *Zelman*, we conclude, for reasons set forth below, that plaintiffs have alleged facts sufficient to state an as-applied Establishment Clause claim under this endorsement test.

Section 1089 is an indirect aid program, under which the state gives tax credits to individuals who contribute to STOs, which in turn use the money to provide private school scholarships. Plaintiffs allege that many of these STOs in fact exist to promote the funding of religious education. If the state of Arizona were to allocate funds directly to these religious STOs, the state would plainly violate the Establishment Clause. *See Bowen*, 487 U.S. at 609-10 (noting that "direct government aid" impermissibly advances religion "if the aid flows to

institutions that are 'pervasively sectarian' "). As defendants correctly argue, however, STOs are private charitable organizations — albeit funded by taxpayer contributions that the state will reimburse through dollar-for-dollar tax credits.[10]

[10] We nevertheless hold that if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause by delegating to taxpayers a choice that, from the perspective of the program's aid recipients, "deliberately skew[s] incentives toward religious schools." *Zelman*, 536 U.S. at 650; *see id.* at 652 (emphasizing that in the educational assistance programs the Court has upheld, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits"). In practice, plaintiffs allege, the choice delegated to taxpayers under Section 1089 channels a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools.[11] The scholarship program thus skews aid in

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[10] Plaintiffs do not argue that STOs are state actors, so we do not decide whether the STOs' conduct, in itself, could support an Establishment Clause claim.

[11] This allegation is distinct from plaintiffs' contention that Section 1089's design reveals its putative secular purpose to be a sham. As we shall discuss below, the Supreme Court has frequently held that state policies enacted for a valid secular purpose violate the Establishment Clause when they are not effectively designed to achieve that purpose. *See, e.g., Nyquist*, 413 U.S. at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the

favor of religious schools, requiring parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education. Accordingly, Section 1089's delegation to taxpayers operates to deprive these parents, as the program's aid recipients, of " 'genuinely independent and private choices' " to direct the program aid to secular schools. *Id.* at 651 (quoting *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986)). Unlike indirect aid programs the Supreme Court has upheld, Section 1089 is not a "neutral program of private choice," and a reasonable observer could therefore conclude that the aid reaching religious schools under this program "carries with it the *imprimatur* of government endorsement." *Id.* at 655.

Defendants dispute this conclusion on two grounds: First, that as private institutions who do not receive direct government funding, they are no different from other nonprofit, religious institutions that are funded through tax-deductible contributions. Second, that under the program, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. We address each of these arguments in turn.

State has taken a step which can only be regarded as one 'advancing' religion.").

1. Aid to Private Institution

Defendants first argue that because STOs do not receive direct government funding, Section 1089 is no different from other programs that accord tax benefits to individuals who contribute to nonprofit, religious institutions. *See, e.g., Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989) (upholding federal tax deduction for contributions to charitable and religious organizations); *see also Walz*, 397 U.S. at 666-67 (upholding state property tax exemption for religious and secular nonprofit organizations). As with any program of government aid, however, whether such programs violate the Establishment Clause depends on whether they have "either . . . the purpose or effect of 'endorsing' religion." *County of Allegheny*, 492 U.S. at 592; *see Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (holding sales tax exemption exclusively available to religious periodicals violated Establishment Clause because it "lack[ed] a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief"); *Nyquist*, 413 U.S. at 783 (holding program including grants and tax deductions for private school tuition had valid secular purpose, but violated Establishment Clause because "the effect of the aid [wa]s unmistakably to provide desired financial support for nonpublic, sectarian organizations"). The parallels defendants contend exist between Section 1089 and tax deduction programs that the Supreme Court has held "easily pass[ ] constitutional muster," *Hernandez*, 490 U.S. at 695, are therefore

instructive, but only to the extent they shed light on the secular objectives, if any, that Section 1089 was enacted to promote.

[11] The secular objectives defendants argue Section 1089 promotes differ significantly from those advanced by tax deduction programs the Supreme Court has upheld. The federal system addressed *in Hernandez*, for example, permits tax deductions for "any charitable contribution" to a qualified entity "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition." 26 U.S.C. §§ 170(a), (c)(2)(B); *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (observing Congress' system of tax deductions and exemptions provides "subsidy to non profit civic welfare organizations generally"). This system, the Court held, makes deductions available for contributions to an array of religious and secular organizations, and thus has "the primary effect of . . . encouraging gifts to charitable entities, including but not limited to religious organizations." *Hernandez*, 490 U.S. at 696. Section 1089, by contrast, offers narrowly targeted, dollar-for-dollar tax credits designed to fully reimburse contributions to STOs, most of which restrict recipients' choices about how to use their scholarships. Although defendants contend these credits were enacted to provide Arizona schoolchildren equal access to a wide range of schooling options, defendants do not — and could not — suggest the credits are designed to promote donations of individual wealth or charitable giving to

a broad array of institutions.[12] Likewise, defendants do not suggest that Section 1089 has a secular purpose in common with laws granting tax exemptions to a broad range of nonprofit organizations, including churches. *See Walz*, 397 U.S. at 672-75 (holding law granting property tax

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[12] As the Court recognized in *Hernandez*, 490 U.S. at 696, tax deductions promote the secular purpose of encouraging individuals to use their own private wealth to make charitable gifts. By contrast, the one-to-one tax credits offered under Section 1089 encourage individuals to give money to private STOs, but allow them to obtain full reimbursement from the state for their contributions. *See Nyquist*, 413 U.S. at 789 (explaining that "the usual attribute of a tax credit" is that it is "designed to yield a predetermined amount of tax 'forgiveness' in exchange for performing a specific act which the State desires to encourage"). In this respect, the tax credits offered under Section 1089 resemble those that encourage individuals to provide public financing for the Federal Election Commission's Presidential Election Campaign Fund ("PECF") but which do not, by design, encourage private charitable donations to the PECF. *See* 26 U.S.C. §§ 9001-13. As we explained in our prior opinion in this litigation:

> a tax credit differs from a tax deduction in that where a tax deduction is involved, giving money to a religious institution is not, as is the case of a tax credit, a free gift. In the case of a tax credit, the taxes due are reduced by the full amount of the gift. In contrast, when a taxpayer is entitled to a tax deduction, the taxpayer must in most if not all instances still pay a majority of the tax involved: it is only his taxable income that is reduced by the amount of the gift, and, thus, his tax liability is reduced only by a percentage of the gift that is equal to the tax rate applicable to his income bracket.

Winn v. Killian, 307 F.3d at 1015 n.5, *aff'd Hibbs v. Winn*, 542 U.S. 88. The tax credits offered under Section 1089 therefore do not promote the same secular purpose as the tax deductions upheld in *Hernandez*.

exemptions to array of religious and secular nonprofit institutions served to promote "beneficial and stabilizing influences in community life" and minimize "[t]he hazards of churches supporting government"); *see also id.* at 678 (noting the "unbroken practice of according . . . exemption[s] to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside"). Thus, we are not persuaded that Section 1089 conforms with the Establishment Clause simply because it bears some superficial resemblance to programs that do.

2. Private Choice

The Supreme Court has "drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citations omitted). Defendants argue that Section 1089, like other religiously neutral educational assistance programs the Supreme Court has found constitutional, is a "program of true private choice . . . and [is] thus constitutional." *Id.* at 653.

The nature of the choices provided under Section 1089, however, differs significantly in structure from those under educational assistance programs the Court has held to be "programs of true private

choice."[13] *Id.* In each of those programs, the government "provid[ed] assistance directly" to parents or individual students, "who, in turn, direct[ed] the government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652. Under the voucher program upheld in *Zelman*, for example, the state distributed tuition aid directly to eligible parents, who were free to use the aid to send their children to any participating public or private school, and those wishing their children to remain enrolled in public school received tutorial aid to accommodate that choice. *Id.* at 645.

Under Section 1089, by contrast, the state does not provide aid directly to parents. Instead the aid is mediated first through taxpayers, and then through private scholarship programs. Under Section 1089, all Arizona taxpayers are eligible for a tuition tax credit, and those whose tax liability is large enough to use the credit may apply it toward a contribution to any STO, regardless of whether that STO provides scholarships exclusively for use at religious schools. In turn, any Arizona parent who wishes to send her child to a private school may apply for a STO scholarship, provided that the child meets the STO's eligibility criteria for the use of that scholarship.

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[13] *See Zelman*, 536 U.S. 639; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding federal program providing sign language interpreter to student attending Catholic school); *Witters*, 474 U.S. 481 (upholding state vocational assistance program paying state aid directly to student attending religious college); *Mueller*, 463 U.S. 388 (upholding state tax deduction available to parents for their children's public and private school expenses).

[12] Unlike parents' choices under the program in *Zelman*, or aid recipients' choices under other programs the Court has upheld, parents' choices are constrained by those of the taxpayers exercising the discretion granted by Section 1089. For example, by choosing to give state-reimbursed money to the Catholic Tuition Organization of the Diocese of Phoenix, which plaintiffs allege to be the largest STO, taxpayers can make their portion of the program aid available only to parents who are willing to send their children to Catholic schools. Although anyone may form a new STO devoted to funding scholarships at secular private schools, Section 1089 prohibits taxpayers from earmarking contributions for their own children. Thus, it is taxpayers who decide which STOs to fund and, consequently, who is eligible to receive STO provided scholarships according to the criteria of the designated STO. Defendants acknowledge the differences between parents' choices under Section 1089 and those afforded under indirect aid programs that the Supreme Court has previously upheld. They contend, however, that because Section 1089 offers "genuine and independent choices" to the taxpayers who fund STOs, these differences are irrelevant to whether Section 1089 violates the Establishment Clause. We disagree.

a. Parental choice

The parties do not contest that notwithstanding its structural differences from indirect aid programs the Court has upheld, Section 1089 would satisfy the Establishment Clause if the program made

scholarships available to parents on a religiously neutral basis and gave them a true private choice as to where to utilize the scholarships. Plaintiffs allege, however, this is not how the program works in practice. In *Zelman*, the Court identified several circumstances relevant to whether the indirect aid program at issue, which gave tuition grants to parents to apply toward private and fee-charging public schools, was "a program of true private choice . . . and thus constitutional[:]"

> [T]he . . . program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking . . . to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the . . . School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. *Program benefits are available to participating families on neutral terms, with no reference to religion.* The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

> There are *no financial incentives that skew the program toward religious schools*. Such incentives are not present . . . where the aid is *allocated on the basis of neutral, secular criteria* that neither favor nor disfavor religion, and *is made available to both religious and secular beneficiaries on a nondiscriminatory basis*.

Id. at 653-54 (emphasis added) (citations, alterations and internal quotation marks omitted).

y13Under this rubric, Section 1089 falls short. The vast majority of the scholarship money under the program — over 85 percent as of the time of plaintiffs' complaint — is available only for use at religious schools.[14] Because this aid is available only to parents who are willing to send their children to a religious school, the program fails to "confer[ ] educational assistance directly to a broad class of individuals defined without reference to religion." *Id.* at 653. Moreover, because a disproportionate amount

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[14] We recognize the Supreme Court in *Mueller*, 463 U.S. at 401, cautioned that such statistics lack constitutional import when a law is facially neutral. This case is different from *Mueller*, however, because Section 1089 does not allocate scholarship funds based on *parents'* choices of schools, but instead mediates financial aid through *taxpayers'* allocations to scholarship programs of their choice. As a result, a parent seeking scholarship aid does not have a "genuine and independent private choice" under the program because the parent's choices are constrained by those of taxpayers. *Zelman*, 536 U.S. at 652. Facts showing the skewed concentration of funds in sectarian school scholarship programs would therefore support the claim that parents are financially incentivized to choose a religious school.

of the program aid is earmarked for use at religious schools *before* parents receive the aid, Section 1089 is not, from the parents' perspective, "neutral in all respects toward religion" and does not equally "permit[ ] the participation of *all* schools . . . religious or nonreligious" in the program. *Id.* Additionally, because Section 1089 does not make aid equally available to parents "on the basis of neutral, secular criteria that neither favor nor disfavor religion," *id.* (alterations in original) (quoting *Witters*, 474 U.S. at 487-88), the program creates " 'financial incentive[s]' " for parents that " 'ske[w]' the program toward religious schools." *Id.* (quoting *Witters*, 474 U.S. at 487-88); *see Zobrest*, 509 U.S. at 10 (upholding program because it "create[d] no financial incentive for parents to choose a sectarian school"). Thus, parents who wish to place their children in a private secular school, but who could not otherwise afford to do so, are at a disadvantage compared to parents who are willing to accept a scholarship for private religious schooling — either by choice or out of financial necessity. Although parents would, of course, have the option of leaving their children in public school, we reject the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice. For parents wait-listed for scholarships to secular schools,[15] the range of educational choices the STO-

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[15] Data in the record, the veracity of which defendants do not challenge, show that in 2004, the Arizona School Choice Trust — the largest of the STOs that provides scholarships to *any* private secular or religious school — reported a waiting list of at least 700 students. If accurate, it would be the kind of

administered scholarship programs offer do not realistically include "obtain[ing] a scholarship and choos[ing] a nonreligious private school." *Zelman*, 536 U.S. at 655. Section 1089, as applied, thereby creates incentives that pressure these parents into accepting one of the scholarships that are readily available under the program for use at a religious school. Therefore, Section 1089, as applied, "fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children." *Id.*

b. Taxpayer choice

Defendants argue that despite this failure, Section 1089 does not violate the Establishment Clause because it provides a tax credit to all Arizona *taxpayers*, without respect to religion, and gives taxpayers a genuine choice between directing their money to religious or secular STOs. Therefore, as *Zelman* requires, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649. Plaintiffs do not contest that Section 1089 is neutral with respect to the taxpayers who direct money to STOs, or that any of the program's aid that reaches a STO does so only as a result of the genuine and independent choice of an Arizona taxpayer. *See Mueller*, 463 U.S. at 398-99. Plaintiffs argue,

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information that would further support plaintiffs' allegation that "parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing and able to make a tuition grant to a student attending the non-religious school of the parents' choice."

however, that Section 1089 violates the Establishment Clause precisely *because* the individual taxpayers' choices available under the program serve to restrict parents' opportunities to select secular educational options for their school-age children, skewing parents' incentives to send their children to religious schools. As such, the program is not "neutral in all respects toward religion" and, concomitantly, is not a "program of true private choice." *Zelman*, 536 U.S. at 653.

Defendants argue that it is irrelevant, under *Zelman*, whether an indirect aid program offers true private choice to parents, or instead, like Section 1089, offers true private choice to another broadly defined class of individuals. In describing what constitutes "true private choice," however, the Court in *Zelman* frequently emphasized that the choice is one offered, on a neutral basis, to *parents* or *students*, as the beneficiaries of the program's aid. *See, e.g.*, *id.* at 652 ("A program . . . [like those the Court has upheld] permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients."); *id.* at 653 (concluding one of the features of "true private choice" in the Ohio voucher program is that "[p]rogram benefits are available to participating families on neutral terms"); *id.* at 669 (O'Connor, J., concurring) ("Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice

among religious and nonreligious organizations when determining the organization to which they will direct that aid."). Defendants contend this emphasis is simply because parental choice was the *only* private choice offered under those programs.

Defendants' argument, however, disregards the Court's analysis of *how* the true private choice described in *Zelman* ensures that government aid flowing to religious institutions does not have "the forbidden 'effect' of advancing . . . religion,' " *id.* at 649, even though the aid would have such an effect under a program of direct funding. *See Bowen*, 487 U.S. at 609-10 (noting "direct government aid" impermissibly advances religion "if the aid flows to institutions that are 'pervasively sectarian' "). The function of true private choice, the Court explained, is to eliminate the perception that the government is *endorsing* religion through the money that is channeled to sectarian institutions: "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652. The Court expressly linked its "true private choice" analysis to the "reasonable observer" inquiry as to whether the government is perceived to endorse the religious organizations that benefit from its aid. *See id.* at 655 (holding, with respect to the parental choice the Court was addressing, that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of

private individuals, carries with it the *imprimatur* of government endorsement").

In drawing this link, the Court adopted Justice O'Connor's position in *Mitchell v. Helms*, 530 U.S. 793 (2000), that " '[i]n terms of public perception, a government program of direct aid to religious schools . . . differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools.' " *Zelman*, 536 U.S. at 655 (quoting *Mitchell*, 530 U.S. at 842- 43 (O'Connor, J., concurring in judgment)). Under this framework, the question central to the endorsement inquiry is whether "the reasonable observer would naturally perceive the aid program [in question] as *government* support for the advancement of religion." *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring in the judgment) (discussing effect of programs providing direct aid to religious schools). "'[T]he reasonable observer in th[is] endorsement inquiry must be deemed aware' of the 'history and context' underlying a challenged program." *Zelman*, 536 U.S. at 655 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (internal quotation marks omitted)); *see also Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("[T]he endorsement test necessarily focuses upon the perception of a reasonable, *informed* observer.") (emphasis added). We impute this knowledge to the reasonable observer because "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . .

discomfort," but instead concerns "the political community writ large." *Id.* at 779; *accord Good News Club*, 533 U.S. at 119 (adopting this position); *see also Capitol Square*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in judgment) ("[T]he applicable observer is similar to the 'reasonable person' in tort law, who is not to be identified with any ordinary individual, who might occasionally do unreasonable things, but is rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.") (internal quotation marks omitted; alteration in original).

[14] Accordingly, to assess whether the taxpayer choice offered under Section 1089 has the same constitutional effect as the parental choice *Zelman* upheld, we must consider the Court's application of the reasonable observer inquiry to the program at issue in that case. Specifically, we must consider the circumstances the Court deemed relevant to *why* a reasonable, informed observer looking at the program upheld in *Zelman* would conclude that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message" resulting from a program "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." 536 U.S. at 652. The Court's guidance in earlier cases also sheds light on two circumstances that seemed particularly important to the reasonable observer analysis in *Zelman*.

First, a reasonable, informed observer would consider what role the person making the choice occupies in the structure of the program. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (holding statute allowing a church or school to veto a liquor license for establishments in their proximity violated the Establishment Clause); *Zelman*, 536 U.S. at 652. In *Larkin*, the Court determined there was no " 'effective means of guaranteeing' " the veto power delegated to churches over liquor licenses " '[would] be used exclusively for secular, neutral, and nonideological purposes.' " *Id.* at 125 (quoting *Nyquist*, 413 U.S. at 780).[16] "In addition," the Court continued, "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* at 125-26. Of course, the delegation of scholarship funding to individual taxpayers, such as in Section 1089, does less to promote religion than the delegation of zoning authority to churches. *Larkin*'s holding, however, illustrates that when a statute delegates "a power ordinarily vested in agencies of government" to a private party, *see id.* at 122, without reasonable

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[16] In *Zelman*, the Court held "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662. As discussed above, Section 1089 does not "offer aid directly to individual recipients," but rather mediates the aid through taxpayers and STOs. Insofar as Section 1089 is not a "program of true private choice," within the meaning of *Zelman*, the Court's holding in *Nyquist* is relevant to determining whether a reasonable observer would conclude the tax credit program endorses religion.

assurance that the party's choices will advance the secular purposes of the statute, any ensuing "perceived endorsement of a religious message" may be "reasonably attribut[ed]" to the government. *See Zelman*, 536 U.S. at 652.

By contrast, the educational assistance programs addressed in *Zelman* were structured so that parents were permitted to choose how to best use the program aid to assist *their* children. The parents' decisive role in the program gave them incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations, such as whether to promote the religious mission of a particular school. Accordingly, by delegating a choice that "ensured that parents were the ones to select a religious school as the best learning environment" for their children, the government did not appear to endorse religion. *Id.* (stating how federal special education program providing sign-language interpreter to student attending Catholic school ensured that "the circuit between government and religion was broken, and the Establishment Clause was not implicated").

Second, a reasonable, informed observer would consider whether the choice delegated under a program has the effect of promoting, or hindering, the program's secular purpose. *See id.* at 655. In *Larkin*, the Court recognized that the statute delegating veto power to churches and schools had the valid secular purpose of "protect[ing] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." 459 U.S. at

123 (internal quotation marks omitted). The Court noted, however, that "these valid secular objectives can be readily accomplished by other means," *id.* at 123-24, and that the veto power conferred by the statute could "be used by churches to promote goals beyond insulating the church from undesirable neighbors," *id.* at 125. The Court concluded that the delegation could "be seen as having a 'primary' and 'principal' effect of advancing religion." *Id.* at 126. Similarly, in *Nyquist*, the Court invalidated a program providing tuition grants and tax credits to parents sending their children to private schools because, although the program had a valid secular purpose, "the effect of the aid [wa]s unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783; *see id.* at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one 'advancing' religion."). *Nyquist* illustrates that if an educational assistance program provides individual choice through tax credits, but those tax credits hinder the program's ability to achieve its valid secular goals, a reasonable observer could well conclude that the tax credits are simply masking an Establishment Clause violation. *Cf. Hibbs v. Winn*, 542 U.S. at 93-94 (discussing school desegregation cases invalidating use of tuition grants and tax credits to circumvent *Brown v. Board of Education*, 347 U.S. 483 (1954)); *see also Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 690 (1994) (invalidating statute creating school district coextensive with religious community that had valid purpose of providing special education services, but

was unnecessarily tailored to promote sectarian aims); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("[I]t is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.") (internal quotation marks omitted) (invalidating state program providing textbooks to racially discriminatory private schools).

[15] The choices delegated to parents under *Zelman*, by contrast, may have advanced — and at least did not thwart — the secular purpose of the program, which was to "provid[e] educational assistance to poor children in a demonstrably failing public school system." 536 U.S. at 649. The best educational environment for a particular child within a failed school system may depend on qualitative considerations that could not easily be assessed at a policymaking level. *See, e.g., id.* at 674-75 (O'Connor, J., concurring) (suggesting metrics other than formal academic achievement that may play a role in parents' educational choices in a failed school district). The choice offered under the program may have therefore helped ensure that the program achieved its secular aims by delegating funding decisions to a class of persons — parents — who were better positioned than a state policymaking body to make educational choices for individual students in a failing school system.

[16] Drawing upon these two circumstances — the role the person making the choice occupies in the structure of a program and whether delegating the choice promotes the secular purpose of the program

— we turn to defendants' argument that the individual, *taxpayer* choice provided under Section 1089 necessarily has the same constitutional effect as the parental choice upheld in *Zelman*. Under Section 1089, individual taxpayers may constrain the scholarship options of other parents' children by choosing to direct their statereimbursed contributions to sectarian STOs. Yet unlike parents, whose choices directly affect their children, taxpayers have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons, such as the academic caliber of the schools to which a STO restricts aid, rather than for sectarian reasons, such as the religious mission of a particular STO. Thus, the taxpayers' position in the structure of Section 1089 provides no " 'effective means of guaranteeing' " that taxpayers will refrain from using the program for sectarian purposes. *Larkin*, 459 U.S. at 125 (quoting *Nyquist*, 413 U.S. at 780). Significantly, plaintiffs' allegations suggest the taxpayers' role in the structure of Section 1089, as applied, *encourages* them to use the tax credits to promote sectarian goals, and that taxpayers have in fact used the program aid to this end.

[17] Relatedly, the taxpayer choice provided under Section 1089 does little to advance — indeed, it appears to thwart — the secular purpose of the program, which is to provide equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents.[17] Defendants do not

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[17] Even if we assumed that taxpayer choice does, in some respect, advance the secular objectives of Section 1089,

suggest taxpayers are better positioned than government administrators to allocate program aid in a manner that will expand schooling options, and plaintiffs' allegations suggest the demand for STO-provided scholarships available for use at secular schools markedly outstrips their supply. This misalignment between parents' interests and taxpayers' desires suggests that by vesting individual taxpayers with funding authority, Section 1089's design works against its purpose of providing Arizona students with *equal* access to a wide range of schooling options. Although Section 1089 leaves individual parents free to create new STOs that cater to their educational preferences, this freedom provides little benefit to parents who do not have the time or capital to get others to support their STO, given that these parents cannot use their tax credits to fund scholarships for their own children.

[18] Accordingly, we conclude that there is a meaningful constitutional distinction between the individual, taxpayer choice provided under Section 1089 and the parental choice upheld in *Zelman*.[18]

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plaintiffs may be able to demonstrate that "these valid secular objectives can be readily accomplished by other means," and therefore that the program nevertheless "could be seen as having a 'primary' and 'principal' effect of advancing religion." *Larkin*, 459 U.S. at 123-24, 126.

[18] In *Green v. Garriott*, ___ P.3d ___, 2009 WL 623346 (Ariz. Ct. App. March 12, 2009), the Arizona Court of Appeals in a 2-1 decision rejected an Establishment Clause challenge to Ariz. Rev. Stat. § 43-1183, which gives dollar for dollar tax credits to corporations for contributions to STOs. The *Green* majority did not consider, as we do here, whether any lack of religious neutrality in the actual operation of Section 1183 "carries with it the *imprimatur* of government endorsement,"

Section 1089, as claimed to operate in practice, is not a program of true private choice, immune from further constitutional scrutiny. We therefore hold that plaintiffs have alleged facts upon which a reasonable, informed observer could conclude that Section 1089, as applied, violates the Establishment Clause even though the state does not directly decide whether any particular sectarian organizations will receive program aid.

The district court's order dismissing plaintiffs' complaint is reversed and remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED for further proceedings.

Zelman, 536 U.S. at 655, and we are unpersuaded by the analysis of whether § 1183 is a program of "true private choice" for the reasons we have already discussed at length.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kathleen M. Winn, an Arizona taxpayer, et al.,	)	No. CIV 00-0287-PHX-EHC
Plaintiffs,	)	**ORDER**
vs.	)	
J. Elliot Hibbs, in his official capacity as Director of the Arizona Department of Revenue, et al.,	)	
Defendants.	)	

Entered: March 25, 2005

Intervenor-Defendant Arizona Christian School Tuition Organization (ACSTO) filed a Motion to Intervene [Dk. 64], which is unopposed. Defendants Arizona School Choice Trust, Glenn Dennard, and Luis Moscoso (collectively "ASCT") filed a Motion to Dismiss [Dk. 71]. Defendant Hibbs filed a Motion for Judgment on the Pleadings [Dk. 72]. ACSTO filed a Motion to Dismiss [Dk. 73]. Plaintiffs responded to the Motions to Dismiss and Motion for Judgment on the Pleadings.[1] ASCT replied.[2] Defendant Hibbs replied [Dk. 77].

[1] Plaintiffs lodged the Response to these Motions on October 29, 2004, which was not docketed pending the Court's ruling (*infra*) on Plaintiffs' Motion for Leave to Exceed Page Limits [Dk. 74].

Procedural History

This case was filed on February 15, 2000. The Court dismissed for lack of subject matter jurisdiction based on the Tax Injunction Act and principles of comity on February 27, 2001 [Dk. 36]. The Ninth Circuit reversed on both of these grounds and remanded. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. Oct. 3, 2002), *reh'g denied*, 321 F.3d 911 (9th Cir. 2003). The Supreme Court granted certiorari, *Hibbs v. Winn*, 539 U.S. 986, 124 S.Ct. 45, 156 L.Ed.2d 703 (2003), and affirmed, holding that the Tax Injunction Act did not bar Plaintiffs' suit. 124 S.Ct. 2276 (2004).

Plaintiffs' Complaint

Plaintiffs challenge the constitutionality of A.R.S. § 43-1089[3] ("Tuition Tax Credit") under the First and Fourteenth Amendments. The Tuition Tax Credit allows Arizona income taxpayers who voluntarily contribute money to a "student tuition organization" (STO) to receive a dollar-for-dollar tax credit up to $500 of their annual tax liability.[4] A.R.S. § 43-1089(A)(1). Thus, Arizona taxpayers who know about the Tuition Tax Credit can effectively choose whether $500 of their tax liability goes to the State

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[2] The reply is file stamped November 15, 2001, but was placed undocketed on the left side of the file.

[3] The statute was enacted in 1997. Minor amendments which are immaterial to this case have since been made [Dk. 72 at 2]. The Court cites the current version of the statute in this Order.

[4] The tax credit is $625 for married taxpayers filing jointly. A.R.S. § 43-1089(A)(2).

or to an STO. A.R.S. § 43-1089(A). No limit is placed on the number of taxpayers who use the Tuition Tax Credit. *Id.* In addition, the Tax Credit is available to all taxpayers, regardless of whether they have children in school or have incurred any educational expenses. *Id.* Taxpayers may earmark their donations for specific children who are not their dependants. A.R.S. § 43-1089(D).

An STO is a charitable organization exempt from federal taxation under I.R.C. § 501(c)(3). A.R.S. § 43-1089(F)(3). Each STO uses taxpayers' voluntary cash contributions to provide scholarships and tuition grants to students attending the "qualified schools" with which the STO is affiliated. A "qualified school" is, essentially, a private school, defined in the statute as a "nongovernmental primary or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin" and that satisfies Arizona's requirements for private schools. A.R.S. § 43-1089(F)(2).

An STO must use at least 90% of the donations received from taxpayers for scholarships or tuition grants to children "to allow them to attend any qualified school of their parents' choice." A.R.S. § 43-1089(F)(3). While this restriction could be read to require each STO to give scholarships to students for use at any private school in the state, the STOs in practice have designated their own list of private schools at which the scholarship money must be

used. However, an STO may not award scholarships to students who are all at the same school. *Id.*[5]

Plaintiffs allege that the largest STOs are religious organizations that restrict their donations to private religious schools which in turn use these funds to promote religious education and worship. In 1998, at least $1.7 million out of $1.8 million (94%) of taxpayer donations to STOs went to STOs that restricted scholarships to students attending religious schools. For example, the three largest STOs, which included ACSTO, received 85% of total STO donations in 1998. Each of these STOs restricted the disbursement of scholarship funds to private religious schools. In 2003, according to the Arizona Department of Revenue, there were 51 STOs. Forty-seven of these STOs which reported their donations received a total of $29.1 million [Dk. 71, Att. 2]. Plaintiffs estimate that at least $22.6 million (78% of the total donations) went to STOs which offered scholarships that could only be used at religious schools [Plaintiffs' Response]; that at least $22.2 million of the total donations (91%) went to students attending religious schools; and that, through 2003, STOs have received $113.3 million that otherwise would have gone to the State. *Id.*

Plaintiffs argue that because most STOs are religious organizations that restrict grants to

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[5] For example, a private school could not set up an affiliated STO serving only that school so that contributing parents could effectively lower each other's tuition by $500. However, two or more schools are permitted to form an STO to achieve this same end.

religious schools, parents who wish to send their children to a non-religious private school may be unable to find an STO that is willing to make a tuition grant to a non-religious private school. Plaintiffs allege that the Tuition Tax Credit as applied allows state revenues to fund education in a religiously preferential manner in violation of the Constitution. Plaintiffs seek preliminary and permanent injunctive relief, a declaratory judgment that § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments, and that STOs which make tuition grants for schools of only one religious denomination must return grants to the State of Arizona general fund.

The Motions to Dismiss and Motion for Judgment on the Pleadings

ASCT raises three arguments in the Motion to Dismiss: first, that Plaintiffs lack taxpayer standing under the Establishment Clause; second, that Plaintiffs fail to state a claim upon which relief can be granted in light of the Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S.Ct. 2460 (2002); and third, that Plaintiff's claims were decided by the Arizona Supreme Court in *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), and are therefore barred by the doctrine of res judicata [Dk. 71]. Defendant Hibbs, in his Motion for Judgment on the Pleadings, discusses *Zelman* and res judicata [Dk. 72]. ACSTO, in its Motion to Dismiss, discusses standing, res judicata, and the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971) [Dk. 73]. If the Court assumes

that Plaintiffs have standing and that the case is not barred by res judicata, Plaintiffs have failed to state a claim under the Establishment Clause.

Failure to State an Establishment Clause Claim under *Zelman*

Defendants argue that Plaintiffs fail to state a claim upon which relief can be granted in light of the Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S.Ct. 2460 (2002). In *Zelman*, the Supreme Court considered Ohio's Pilot Project Scholarship Program ("Cleveland program"), which provided financial assistance to any Ohio School District which was "under a federal court order requiring supervision and operational management of the district by the state superintendent." 536 U.S. at 644, 122 S.Ct. at 2463. The Cleveland City School District was Ohio's only school district in this category. 536 U.S. at 645, 122 S.Ct. at 2463.

The Cleveland program provided tuition aid for students to attend a participating public or private school of their parents' choosing. Students remaining in public schools were eligible for tutorial aid. *Id.* Participating private schools were not permitted to discriminate on the basis of religion. *Id.* Tuition aid was distributed according to financial need. 536 U.S. at 646, 122 S.Ct. at 2464. Over 3,700 students received tuition aid from the Cleveland program, and 96% of these students enrolled in religiously affiliated schools. 536 U.S. at 647, 122 S.Ct. at 2464.

Sixty percent of these students came from families at or below the poverty line. *Id.*

The Supreme Court held that the Establishment Clause "prevents a State from enacting laws that have the purpose or effect of advancing or inhibiting religion." 536 U.S. at 648-49, 122 S.Ct. at 2465 (citation and internal quotation marks omitted). Although the government may not provide aid directly to religious schools, "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals," do not violate the Establishment Clause. 536 U.S. at 649, 122 S.Ct. at 2465.

1. *Secular Purpose of the Tuition Tax Credit*

A "plausible secular purpose" for the Tuition Tax Credit "may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 395, 103 S.Ct. 3062, 3067 (1983). The Tuition Tax Credit on its face does not mention religion but is instead part of a secular state policy to maximize parents' choices as to where they send their children to school. *Kotterman*, 193 Ariz. at 278, 972 P.2d at 611. Public school districts in Arizona may not charge tuition and must provide for open enrollment. A.R.S. § 15-816.01(A), *Kotterman*, 193 Ariz. at 283, 972 P.2d at 616. Arizona has established charter schools in order to "provide additional academic choices for parents and pupils." A.R.S. § 15-181 (1994). Charter schools

are public schools that do not charge tuition.[6] Arizona provides another tax credit, approved on the same day as the Tuition Tax Credit, that only benefits public schools. A.R.S. § 43-1089.01. As amended, this tax credit allows any Arizona taxpayer to receive up to a $200 tax credit[7] for fees paid or cash contributions made to public schools for extracurricular activities or character education. *Id.* Finally, Arizona has a permissive home-schooling policy. A.R.S. § 15-802 (authorizing education at home-school); A.R.S. § 15-803 (excepting home-schooled students from mandatory public school attendance); A.R.S. § 15-745 (excepting home-schooled students from testing while they are receiving home school instruction).

2. *Programs of True Private Choice*

The Tuition Tax Credit is a program of "true private choice." *Zelman*, 536 U.S. at 649, 122 S.Ct. at 2465. The benefits of the Tuition Tax Credit are available to a broad spectrum of groups; money which would otherwise go to the State can only go to religious schools after being filtered through multiple layers of private choice; and recipients of STO funds still have financial incentives to attend public schools. Indeed, Arizona has given its schoolchildren a range of educational choices

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[6] Arizona has 348 charter schools in operation. Arizona State Board for Charter Schools, Charter Summary Report, http://www.asbcs.state.az.us/asbcs/CharterSummary.asp (last visited March 23, 2005).

[7] Married tax payers filing jointly can claim a $250 tax credit. A.R.S. § 43-1089.01(A)(2).

consistent with a program of true private choice. Therefore, the fact that most donations to STOs have ultimately gone to religious schools does not implicate the Establishment Clause.

First, whether the Tuition Tax Credit is made available to a broad spectrum of groups is "an important index of secular effect." *Zelman*, 536 U.S. at 650, 122 S.Ct. at 2466 (citing *Widmar v. Vincent*, 454 U.S. 263, 274, 102 S.Ct. 269, 277 (1981)). Any student in the state, without regard to religion, may apply for and potentially receive an STO scholarship to attend a private school, secular or religious. In fact, the Tuition Tax Credit is available to an even broader spectrum of the public than the Cleveland program in the sense that all Arizona taxpayers, not just parents of students, can use the tax credit to exercise a choice in how their money, which would otherwise be subject to taxes, is spent.

Second, the Tuition Tax Credit provides for multiple layers of private choice such that "government aid [reaches] religious institutions only by way of the deliberate choices of numerous individual recipients." *Zelman*, 536 U.S. at 652, 122 S.Ct. at 2467. In this way, "government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." 536 U.S. at 652-53, 122 S.Ct. at 2467. The Tuition Tax Credit allows for the private formation of non-profit STOs to raise money for the schools of their choice. Then, taxpayers, if they elect to invoke the tax credit at all, donate to the STO of their choice. Finally, parents choose the school that they want their child to attend

and apply for aid from an STO which grants scholarships to that school. Whereas the Cleveland program disbursed government funds to private schools,[8] the Tuition Tax Credit allows funds which the government would otherwise receive to go to the STOs for disbursement, insulating the funds with an additional layer of private choice not present in *Zelman*, 536 U.S. at 646, 122 S.Ct. at 2464.

Third, the Tuition Tax Credit does not provide taxpayers or students financial incentives which are skewed toward religious schools. *Zelman*, 536 U.S. at 653, 122 S.Ct. at 2468. STOs have no financial incentive to fund religious schools over secular ones. Taxpayers have no financial incentive to support STOs which favor religious schools over STOs that do not; indeed, taxpayers have no financial incentive to support any STO at all to the degree that they may not make donations to their own dependants. Nor do parents of students have any skewed financial incentive to send their child to a religious school. An Arizona student may attend any public school in the state without cost, just as the students in *Zelman* could attend community and magnet schools for free. 536 U.S. at 654, 122 S.Ct. at 2468. In contrast, the average scholarship paid by STOs in 2003 for students to attend private schools was $1,222,[9] a sum unlikely to cover all of the costs of private school attendance [Response, Att. 2 at 2].

[8] The Ohio statute provided for checks to be made directly to parents who then endorsed the checks over to the chosen school. 536 U.S. at 646, 122 S.Ct. at 2464.

[9] The average scholarship award in 1998 was $452.

In *Zelman*, the Court inquired whether the state was coercing parents into sending their children to religious schools by "evaluating *all* options Ohio provides Cleveland schoolchildren." 536 U.S. at 655-56, 122 S.Ct. at 2469 (emphasis in original). Arizona has provided the requisite "range of educational choices," 536 U.S. at 655, 122 S.Ct. at 2469, to parents through its policy of free public education (including open enrollment and the provision of charter schools), tax credit for donations to public school extracurricular activities and character education, and permissive home-schooling policy. The Tuition Tax Credit expands parents' private school options, both secular and religious.

Where the challenged program was neutral toward religion and preserved true private choice, the *Zelman* court did not attach constitutional significance to the amount of state funds ultimately spent on religious education or the number of scholarship recipients enrolled in religious schools. 536 U.S. at 658, 122 S.Ct. at 2470. In Arizona, many (perhaps most) STOs have chosen to support, sometimes exclusively, religious schools; most taxpayers have chosen to support STOs which favor religious schools; most private schools have chosen to incorporate religion into their educational mission; and most STO scholarship recipients have chosen to attend religious schools. These private choices, and there are literally thousands of them, do not implicate the Establishment Clause. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion...").

Plaintiffs argue that the fact that STOs may elect to disburse scholarship funds based in part on religious affiliation distinguishes this case from *Zelman*. They point out that ASCT, one of the largest STOs that does not disburse its scholarships with any reference to religion, had a waiting list of over 700 people in the Fall of 2004 [Dk. 71, Exh. 3]. In *Zelman*, the Court found it significant that the benefits of the Cleveland program were "available to all families on neutral terms, without reference to religion." 536 U.S. at 653, 122 S.Ct. at 2468. Here, the fact that most STOs fund only religious schools represents a multitude of private choices not implicating the Establishment clause. The Tax Tuition Credit is neutral on its face and as applied; nothing prevents taxpayers from increasing their contributions to existing STOs which provide scholarships to secular private schools or from forming new STOs themselves for that same purpose. *See* 536 U.S. at 658, 122 S.Ct. at 2470 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.") [10]

[10] The ACST School Quarterly that Plaintiffs cite reported that "[O]ver 700 students are on ASCT's waiting list for scholarships. But that can change! Thanks to the **limitless potential of the scholarship tax credit program**, we have **the opportunity to receive millions in new tax credit donations annually**, enough to fund thousands of additional scholarships. Past experience suggests that a dollar spent on marketing the tax credit program will return more than ten

Plaintiffs also argue that the Cleveland program is distinguishable from the Tuition Tax Credit because the former provided vouchers for both public and private schools, whereas the latter only provides assistance to private schools. This distinction is not relevant here. First, the State has a policy, of which the Tuition Tax Credit is only a small part, to maximize parents' educational choices for their children, primarily in the public schools.[11] Second, states may provide assistance to private schools without violating the Establishment Clause. In *Mueller v. Allen*, the Supreme Court held that a Minnesota tax deduction for parents' expenses in providing tuition, textbooks and transportation for their children attending elementary or secondary schools, public or private, did not violate the Establishment Clause. 463 U.S. 388, 103 S.Ct. 3062 (1983). The *Mueller* court held that a state may "conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian." 463 U.S. at 395, 103 S.Ct. at 3067.

Third, the Supreme Court's ruling in *Committee For Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955 (1973), is distinguishable from this case. The *Nyquist* court

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dollars in scholarship tax credit donations' (emphasis in original) [Dk. 71, Exh. 3]

[11] For example, the State appropriated $2.6 billion to the Department of Education in FY 2002-2003, or 43.5% of the total budget. Arizona Department of Education, Annual Financial Report, State Funding for Education, http://www.ade.state.az.us/annualreport/annualreport2003/Summary/StateFundEducation.htm (last visited on March 23, 2005)

held that a New York program conferring a package of benefits exclusively on private schools and parents of private school enrollees violated the Establishment Clause. However, the *Zelman* court held that "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662, 122 S.Ct. at 2472. The Tuition Tax Credit is a neutral, secular program whose benefits are available to all Arizona taxpayers and students. Furthermore, multiple layers of private choice ensure that the State itself does not aid recipients with regard to their religion.

Finally, Plaintiffs argue that the educational crisis precipitating the Cleveland program distinguishes this case from *Zelman*. Indeed, the Supreme Court recognized that the purpose of the Cleveland program was to "assist poor children in failed schools." 536 U.S. at 655, 122 S.Ct. at 2469. In contrast, Defendants have not argued that Arizona schools are failing or even that the Tuition Tax Credit will primarily benefit the poor. However, Plaintiffs' objections are irrelevant to the constitutional analysis, which only asks whether the program has a valid secular purpose, seeking neither to advance nor inhibit religion. 536 U.S. at 648-649, 122 S.Ct. at 2465; *cf. Am. Jewish Cong. v. Corp. for Nat'l. & Cmty. Serv.*, No. 02 Civ. 1948 (D.C. Cir. Mar. 8, 2005) (holding that discretionary distribution of government funds to AmeriCorps recipients is permissible under the Establishment Clause, which only requires that government distribute funds

neutrally with respect to religion), *rev'g* 323 F.Supp.2d 44 (D. D.C.2004). Arizona's policy of maximizing the choices available to parents is a valid secular purpose; indeed, no useful purpose would be served by making the State wait until its schools were in the same kind of trouble as Cleveland's before implementing a program of true private choice.

Conclusion

The Court, having accepted all allegations in the Complaint as true, finds that Plaintiffs have failed to state a claim under the Establishment Clause.

Accordingly,

IT IS ORDERED GRANTING Intervenor-Defendant Arizona Christian School Tuition Organization's Motion to Intervene [Dk. 64]

IT IS FURTHER ORDERED GRANTING ASCT's Motion to Dismiss [Dk. 71] without prejudice.

IT IS FURTHER ORDERED DENYING AS MOOT Defendant Hibbs' Motion for Judgment on the Pleadings [Dk. 72].

IT IS FURTHER ORDERED DENYING AS MOOT ACSTO's Motion to Dismiss [Dk. 73]

DATED this 24 day of March, 2005.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, an Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs-Appellants, vs ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO, GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD, Defendants-Appellees.	No. 05-15754 D.C. No. CIV 00-00287-EHC District of Arizona, Phoenix ORDER

Entered November 16, 2009

Before: D.W. NELSON, REINHARDT and FISHER Circuit Judges

The motion to stay the mandate, filed October 29, 2009 by appellees Arizona School Choice Trust, et al., and Arizona Christian School Tuition Organization, is granted.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, an Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer LYNN HOFFMAN, an Arizona taxpayer,
Plaintiffs-Appellants,

v.

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD,
Defendants-Appellees.

No. 05-15754

D.C. No. CV-00-00287-EHC
District of Arizona, Phoenix

ORDER

Filed October 21, 2009

Before: Dorothy W. Nelson, Stephen Reinhardt and Raymond C. Fisher, Circuit Judges.

Order;
Concurrence by Judge Pregerson;
Concurrence by Judge D.W. Nelson;

Dissent by Judge O'Scannlain

ORDER

Judges Reinhardt and Fisher voted to reject the petitions for rehearing en banc and Judge Nelson so recommended.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The three petitions for rehearing en banc, filed May 14, 2009, are **denied.**

PREGERSON, Circuit Judge, concurring:

For the reasons stated by the panel in its concurrence, I also concur in the denial of rehearing en banc.

D.W. NELSON, REINHARDT and FISHER, Circuit Judges, concurring in the denial of rehearing en banc:

A majority of the active judges of our court declined to vote for rehearing of this case en banc. We concur in the court's decision not to go en banc.

The State of Arizona finances private "school tuition organizations" (STOs) by giving dollar-for-dollar tax credits to individuals who contribute to them. On its face, the statute creating this subsidy requires STOs to provide scholarships for students "to attend *any* qualified school of their parents' choice." Ariz. Rev. Stat. Ann. § 43-1089(G)(3) (2005) (emphasis added).[1] As the Arizona Department of Revenue applies the statute, however, the state reimburses contributions to STOs that restrict their scholarships to use at religious schools. Consequently, 85 percent or more of the state financed scholarship money is available only to students whose parents are willing to send them to sectarian institutions.[2] If these facts are proved true,

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[1] All references to "Section 1089" refer to the program as set forth in Arizona Revised Statutes Annotated § 43-1089 (2005), the version of the statute in place when plaintiffs' complaint was filed. Any differences between this and the current version of Section 1089 are not significant for purposes of the analysis.

[2] The dissent sees no constitutional distinction between a tax deduction and a tax credit. *See* Dissent 14721 n.3. We disagree. A tax-credit eligible contribution to an STO costs the taxpayer nothing. *See Winn v. Killian*, 307 F.3d 1011, 1015 n.5 (9th Cir. 2002), *aff'd sub. nom Hibbs v. Winn*, 542 U.S. 88 (2004) ("From a purely financial perspective, . . . a taxpayer is unaffected by his decision as to whether or not to make an STO contribution. The funds that he may contribute will be unavailable to him in any event: they will be used either to make the contribution or to pay the taxes he owes."). Tax deductible contributions, by contrast, impose a cost on the taxpayer. *See id.* ("[W]hen a taxpayer is entitled to a tax deduction, the taxpayer must in most if not all instances still pay a majority of the tax involved[.]"). Whereas a tax deduction would lower the cost of contributions to STOs, a dollar-for-

the Arizona Department of Revenue's execution of the scholarship program (Section 1089) violates the Establishment Clause. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court upheld a school voucher program that "provide[d] assistance directly" to parents without regard for religion, and public funds reached religious institutions only as the result of parents' choices about their children's education. *Id.* at 652. Parents received aid whether or not they were willing to enroll their children in sectarian schools, so the program did not exert pressure on parents to choose religious schools. Under the Arizona program, by contrast, taxpayers, rather than parents, direct funds to religious organizations. Access to assistance is restricted on the basis of religion, creating financial incentives that may skew parents' choices toward religious schools. *See id.* at 650. The differences between the Ohio and Arizona programs are constitutionally meaningful.

The dissent from rehearing en banc demonstrates that others may prefer a more expansive reading of *Zelman*. Careful review of the two cases, however, shows why the dissent's argument that "*Winn* cannot be squared with the Supreme Court's mandate in *Zelman*" is not persuasive. Dissent 14719-20.

I. Background

On its face, Section 1089 appears to provide for

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dollar tax credit reduces that cost to zero, in effect allowing individual taxpayers to directly allocate public funds.

parental choice. The statute says that for an organization to qualify as an STO eligible to receive state-reimbursed contributions the organization must provide scholarships "to children to allow them to attend *any* qualified school *of their parents' choice*." Ariz. Rev. Stat. Ann § 43-1089(G)(3) (emphasis added).[3] If this were how Arizona applied the statute, the Arizona program would be similar to the majority of the tax credit programs currently in operation. Like Section 1089, four of these programs contain provisions directing scholarship organizations to provide scholarships for students to attend *any* qualified school of their parents' choice.[4] These "parental choice" clauses may explain the apparent absence of any Establishment Clause challenges to those programs.

This is not, however, how the Arizona Department of Revenue applies the statute. According to plaintiffs' complaint, Arizona gives tax credits reimbursing individuals who contribute to STOs that expressly restrict their scholarships to use at religious schools. The largest STO, the

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[3] A "qualified school" is defined by statute as "a nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state." *Id.* § 43- 1089(G)(2).

[4] *See* Fla. Stat. § 220.187(6)(h); Ga. Code Ann. § 20-2A-1(3)(A); Ind. Code § 20-51-3-1(b); Iowa Code § 422.11S(5)(c)(1); R.I. Gen. Laws § 44- 62-2(a). One of the currently operating programs contains no such parental choice provision. *See* 24 Pa. Stat. Ann. § 20-2005-B.

Catholic Tuition Organization of the Diocese of Phoenix, restricts its scholarships to use at Catholic schools in the Phoenix Diocese; the second largest, the Arizona Christian School Tuition Organization provides scholarships only to students attending evangelical Christian schools; and the third largest, Brophy Community Foundation, restricts its scholarships to use at two specific Catholic schools. *See Winn*, 562 F.3d at 1006. As a result of how the Arizona Department of Revenue applies Section 1089, plaintiffs allege, these three religious STOs controlled 85 percent of the total STO donations in 1998, the year before the complaint was filed. *See id.* at 1006. Plaintiffs argue that it is this application of Section 1089 that violates the Establishment Clause.

II. Effect

We turn first to the issue of "whether Section 1089 'has the forbidden "effect" of advancing or inhibiting religion.' " *Winn*, 562 F.3d at 1012 (quoting *Zelman*, 536 U.S. at 649).

A. Parental Choice

The *Winn* panel held that the Arizona Department of Revenue's application of Section 1089 may not provide parents with "true private choice" within the meaning of *Zelman*. *See id.* at 1015-18. With respect to this conclusion, the dissent accuses the panel of rejecting the majority's holding in *Zelman* in favor of Judge Souter's dissent. Not so.

1.

The dissent fails to address the crucial difference between the Ohio voucher program upheld in *Zelman* and the Arizona Department of Revenue's application of Section 1089: with respect to religion, the Ohio program gave parents *equal access* to tuition benefits. *See Zelman*, 536 U.S. at 645. Under the Ohio program, the state provided tuition aid on the basis of financial need, without regard to religion, and eligible parents were free to apply the aid toward any private school, religious or secular, or toward a public school outside the district willing to participate in the program (though none was). If a parent decided to send her child to a private school, the state wrote a check made payable to the parent, which the parent could then endorse over to her chosen school. *See id.* at 646. Crucially, a parent's choice to send her child to a religious school would *neither help nor harm* her chance of receiving tuition aid.

Whether such a program violates the Establishment Clause, the Court held, does not depend on whether the parent receiving tuition aid has a broader array of religious than secular schools to choose from. This is because "[t]he constitutionality of a *neutral* educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Id.* at 658 (emphasis added). The majority in *Zelman* made clear, however, that a "neutral

educational aid program" — or, as the Court also put it, a "program of true private choice" — is one that grants *access* to benefits without regard to religion. *Id.* at 658, 662.

The importance of providing equal access to benefits is emphasized throughout *Zelman*. A common thread running through indirect aid programs the Supreme Court has upheld against Establishment Clause challenges, the *Zelman* Court observed, is that they have been "*neutral* with respect to religion[ ] and provide[d] assistance *directly* to a broad class of citizens." *Id.* at 652 (emphases added); *see also Mueller*, 463 U.S. at 397; *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).[5] Likewise, under the Ohio voucher program, the Court stressed, "[p]rogram *benefits* are available to participating families *on neutral terms*, with no reference to religion." *Zelman*, 536 U.S. at 653 (emphases added).

By contrast, as plaintiffs allege the Arizona Department of Revenue applies the statute, access to Section 1089-funded scholarships is not "available . .

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[5] The program upheld in *Mueller*, *Zelman* explained, provided aid to " '*all* parents' " to pay for certain educational expenses at secular or religious schools. *Zelman*, 536 U.S. at 650 (quoting *Mueller*, 463 U.S. at 397). Under the program in *Witters*, *Zelman* continued, "*recipients* generally were empowered to direct the aid to schools or institutions *of their own choosing*." *Id.* at 651 (emphases added). Likewise, the program upheld in *Zobrest* " 'distribute[d] benefits *neutrally to any child* qualifying as disabled,' " without regard to religion. *Id.* (emphasis added) (quoting *Zobrest*, 509 U.S. at 10).

. on neutral terms, with no reference to religion." Parents who are unwilling to send their child to a religious school may be denied access to program benefits because, as plaintiffs allege, there are not a sufficient number of scholarships available for use at secular schools. Accordingly, these parents are shut out of the program altogether, and at the very least their chances of receiving benefits are harmed by their choice to send their child to a secular school.

This lack of access on a religiously neutral basis explains why Section 1089 as operated by the Arizona Department of Revenue would violate the Establishment Clause. This conclusion is entirely consistent with — and required by — the Court's analysis in *Zelman*. It is true that the majority in *Zelman* rejected Justice Souter's view that the number of religious and secular schools participating in the Ohio voucher program was relevant to its constitutionality. But before the Court addressed Justice Souter's concerns, it first identified several features of the Ohio program that made it one of "true private choice . . . , and thus constitutional." *Id.* Among these features, the tuition aid distributed under the Ohio program created "no 'financial incentives' that 'skew[ed]' the program toward religious schools." *Id.* (alteration omitted) (quoting *Witters*, 474 U.S. at 487-88). The Court recognized that "[s]uch incentives 'are not present where the aid is *allocated* on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is *made available to both religious and secular beneficiaries on a nondiscriminatory basis.*' " *Id.* at 653-54 (emphasis added, alteration and ellipses omitted)

(quoting *Agostini v. Felton*, 521 U.S. 203, 231 (1997)).

The Arizona Department of Revenue permits scholarships funded under Section 1089 *not* to be "made available to both religious and secular beneficiaries on a nondiscriminatory basis." Therefore, *Zelman* requires a closer look at whether the program, as applied, creates "financial incentives that skew the program toward religious schools." *Id.* at 653 (alterations and internal quotation marks omitted). This is why it is relevant that, by allowing tax credits for contributions to discriminatory STOs, the Arizona Department of Revenue has created an overwhelming disparity in the number of scholarships exclusively available for use at religious schools compared to the number available for use at secular schools. *See Winn*, 562 F.3d at 1016-18.

Consistent with Section 1089's parental choice provision, *see* Ariz. Rev. Stat. Ann. § 43-1089 (2005), the Arizona Department of Revenue *could* apply the program to require that STOs make state-funded scholarships "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Zelman*, 536 U.S. at 653-54 (internal quotation marks omitted). If Section 1089 were applied in this neutral manner, data concerning the number of scholarships applied toward religious schools versus secular schools would indeed be irrelevant to the Establishment Clause inquiry as long as the State of Arizona otherwise provided students "a range of [secular] educational choices." *Id.* at 655.

As Section 1089 is currently applied, however, the program allows state-funded scholarships to be restricted to use at religious schools. It is therefore necessary to consider whether, in reality, the program creates incentives for parents to send their children to religious schools in order to gain access to benefits. This conclusion is required by — and, at the very least, consistent with — *Zelman*.[6]

2.

The dissent contends that the Arizona program is valid because the State of Arizona has *other* programs in place that provide secular educational options for those unable to obtain a program scholarship. *See Zelman*, 536 U.S. at 655-56 ("The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to *obtain* a program scholarship and then choose a religious school." (emphases added)). The dissent

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[6] The dissent's hypothetical, about a world in which Section 1089 operates to restrict scholarships to use at secular schools, is premised on the misunderstanding that, under the Free Exercise Clause, governments have an affirmative obligation to fund religious educational options if they decide to make secular options available. *See* Dissent 14725-26. *But see Locke v. Davey*, 540 U.S. 712 (2004) (rejecting Free Exercise challenge to statute providing postsecondary education scholarships but prohibiting use of the scholarships for a degree in devotional theology from a religious institution). Constitutional limitations on support for religion do not precisely mirror limitations on failures to support religion.

fails to recognize *Zelman's* holding that a program of "true private choice" is one in which "[p]rogram benefits are available to participating families on neutral terms, with no reference to religion." *Id.* at 653. A short hypothetical will show why the dissent's reading of *Zelman* is untenable. Consider a program, instituted by a state that provides an array of secular educational options, that offers tax deductions exclusively to parents sending their children to private schools. Each eligible parent receives a tax deduction unrelated to the amount spent on tuition, thus ensuring a windfall to parents who send their children to religious schools, which typically charge lower rates than secular private schools. Assume this hypothetical program has a valid secular purpose. For most potential recipients, however, benefits under the program are, as a practical matter, available only if the recipient chooses to send her child to a relatively low-cost religious school. Thus, the unmistakable effect of the program is to create special incentives to send one's child to a sectarian school.

Under the dissent's reading of *Zelman*, this hypothetical program would easily withstand an Establishment Clause challenge. Anyone can participate in the program. Anyone who participates receives identical tax benefits. Anyone can apply the tax benefits toward a private school of his or her choice. *See* Dissent 14722. Moreover, for those who choose not to participate in the program, the state provides an array of public schooling options. *See id.* at 14732-33.

This program is not a hypothetical; it is the New York tax deduction scheme invalidated in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) — a case that *Zelman* distinguished but declined to overturn.[7] *See Nyquist*, 413 U.S. at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and non-public education, the State has taken a step which can only be regarded as one 'advancing' religion."); *Zelman*, 536 U.S. at 661 (observing that the " 'function' " of the New York program "was '*unmistakably* to provide desired financial support for nonpublic, sectarian institutions' " (quoting *Nyquist*, 413 U.S. at 783 (emphasis added))). *Zelman* explained that *Nyquist* had "expressly reserved judgment with respect to 'a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted.' " *Id.* (quoting *Nyquist*, 413

[7] The New York program also had provisions offering private school tuition reimbursements, paid directly to the school, for parents who fell below a certain income level and grants to private schools for the maintenance and repair of their facilities. The Court treated each provision of the program as severable and held that each provision separately violated the Establishment Clause. *See Nyquist*, 413 U.S. at 741-45. Nothing in *Zelman* suggests the Court would have upheld the tax deduction provision of the New York program if it had been considered in isolation. *See Zelman*, 536 U.S. at 661 (observing that New York program "gave a package of benefits exclusively to private schools and the parents of private school enrollees" and "provided tax benefits 'unrelated to the amount of money actually expended by any parent on tuition,' ensuring a windfall to parents of children in religious schools" (quoting *Nyquist*, 413 U.S. at 790)).

U.S. at 782-83). The Ohio voucher program fit this description. The Arizona Department of Revenue's application of Section 1089 does not.

In *Zelman*, the Court clarified that "*Nyquist* does not govern neutral educational assistance programs that . . . offer aid directly to a broad class of individual recipients defined without regard to religion." *Id.* at 662. According to the dissent, Section 1089 is such a "neutral educational assistance program." By the dissent's logic, however, the New York program invalidated in *Nyquist* would also be such a program. Even more troublesome, a program that provided tax deductions exclusively to parents sending their children to *religious* schools would also constitute a "neutral educational assistance program" as long as the state had other programs in place that provided secular educational options. It is this result, not the outcome in *Winn*, "that simply cannot be reconciled with *Zelman*." Dissent 14724. The Supreme Court elected not to overturn *Nyquist*, and we may not do so on its behalf.

B. Taxpayer Choice

Next, the dissent challenges the panel's conclusion that the choices provided to *taxpayers* under Section 1089 — choices that, plaintiffs allege, restrict *parents'* access to secular educational scholarships — fail to render the program constitutional. *See Winn*, 562 F.3d at 1018-23. Specifically, the dissent contends the panel misapplied *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). A careful

reading of *Winn* shows that the dissent exaggerates the panel's reliance on *Larkin*.

Larkin does not control this case. *See Winn*, 562 F.3d at 1020 (emphasizing that "the delegation of scholarship funding to individual taxpayers, such as in Section 1089, does less to promote religion than the delegation of zoning authority to churches," such as provided under the statute at issue in *Larkin*). Rather, the panel observed that *Larkin*'s holding

> illustrates that when a statute delegates "a power ordinarily vested in agencies of government" to a private party, *see* [*Larkin*, 459 U.S.] at 522, without reasonable assurance that the party's choices will advance the secular purposes of the statute, any ensuing "perceived endorsement of a religious message" may be "reasonably attribut[ed]" to the government.

Winn, 562 F.3d at 1020-21 (second quotation from *Zelman*, 536 U.S. at 652).

Contrary to the dissent's suggestion, *Larkin*'s holding is not limited to cases where the state vests governmental powers in a "pervasively sectarian organization." Dissent 14735. In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), for example, the Court applied *Larkin* when considering an Establishment Clause challenge to a statute creating a school district coextensive with a religious community. This statute vested power in individual taxpayers, not in a

religious organization, but the Court nonetheless invalidated it. *See id.* at 698 ("The Establishment Clause problem [at issue] is more subtle [than that in *Larkin*], but it resembles the issue raised in *Larkin* to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion."). Again, *Winn* does not suggest that the choices delegated to taxpayers under the Arizona Department of Revenue's construction of Section 1089 are the constitutional equivalent of the legislative action at issue in *Kiryas Joel*. That case makes clear, however, that the delegation concerns identified in *Larkin* are relevant to whether a reasonable, informed observer would conclude that the choices delegated under Section 1089 have the effect of promoting, or hindering, the program's secular purpose.[8]

The dissent further argues that in terms of constraining parents' access to secular educational options, taxpayers' choices under Section 1089 are no more constitutionally problematic than the choice of public schools not to participate in the Ohio voucher program in *Zelman*. Dissent 14736. This misses the point. Under the Ohio program, it was not the public schools' choices that ensured "the Establishment Clause was not implicated" — it was the *parents'*

[8] The dissent asserts that the "allocation of scholarship funds" is not a traditional governmental function. Dissent 14735 n.20. This framing of the question is unhelpfully narrow. Educational policy is certainly a traditional government function, and the state's decision to reimburse contributions to private scholarship funds is indisputably an educational policy decision.

choices. *Zelman*, 536 U.S. at 652. Each parent had an equal choice under the Ohio program as to whether to apply a tuition voucher toward a private school, and the choice of one parent did not directly alter the array of options available to another parent. Accordingly, under the Ohio program, a parent's choice as to how best to educate her child had no coercive effect on another parent's choice whether to send her child to a secular or religious school. The Ohio program thus provided each eligible parent with a "genuine and *independent* private choice" whether to direct assistance to a religious school. *Id.* (emphasis added). The choices given to parents under the program therefore ensured "the circuit between government and religion was broken." *Id.* Although a public school's decision not to accept a voucher could indeed frustrate the secular purpose of the Ohio program, the Supreme Court did not *rely* on those choices to conclude the program was constitutional.

By contrast, the appellees in *Winn rely* on taxpayers' choices in arguing that the current construction of Section 1089 is valid under the Establishment Clause. The effect of these taxpayer choices, however, may be to *harm* the ability of aspiring scholarship recipients to obtain a scholarship available for use at a secular school. Accordingly, Section 1089 "delegat[es] to taxpayers a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.' " *Winn*, 562 F.3d at 1013 (quoting *Zelman*, 536 U.S. at 650)). Such choices are not, in

themselves, sufficient to render an educational aid program valid under the Establishment Clause.

In summary, it was crucial to *Zelman*'s holding that the Ohio program afforded aid *recipients* a "genuine and independent private choice" whether to direct the assistance they received toward a religious school. *Zelman*, 536 U.S. at 652. Although the Arizona Department of Revenue's application of Section 1089 does not afford such choice, *Winn* carefully determined that the choice provided to *taxpayers* is insufficient to ensure "the circuit between government and religion was broken." *Id.* For reasons carefully laid out in the decision, our court was correct to decline en banc review.

III. Secular Purpose

The dissent also faults *Winn* for concluding that Section 1089 may lack a valid secular purpose. *See* 562 F.3d at 1011- 12. This criticism is premature. The question before the panel was "not whether Section 1089 in fact has a genuine, secular purpose, but whether plaintiffs could prove, on the facts alleged in the complaint, that it does not." *Id.* at 1012.

As the dissent states, a "legislature's stated reasons" for enacting a statute "will generally get deference," and must be accepted as true except in "unusual cases where the claim was an apparent sham, or the secular purpose secondary." *Mc- Creary County v. ACLU of Ky.*, 545 U.S. 844, 865 (2005). The inquiry into whether a statute's ostensible

purpose is a sham or secondary to a religious objective, however, must be "undertaken from the perspective of 'an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.' " *Winn*, 562 F.3d at 1012 (quoting *McCreary*, 545 U.S. at 862. The dissent's position would foreclose such an inquiry.

The dissent surmises that in enacting Section 1089, "[t]he legislature could hardly have had the 'purpose' of endorsing religion when it set up a plan that, *for all it knew*, could have resulted in absolutely no funding for religious entities." Dissent 14739 (emphasis added). The dissent makes this claim without citing any evidence concerning what the legislature *actually* knew about how Section 1089 would likely operate. This is just as well, because no such evidence yet appears in the record. But the dissent suggests it should not *matter* to us whether the legislature knew that Section 1089 would result in disproportionate funding being made available only for use at religious institutions. The Supreme Court has cautioned us, however, against evaluating a program's purpose from the perspective of an "absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S. at 866. In short, the dissent appears to call for either a heightened pleading standard for Establishment Clause claims — under which the plaintiff must allege specific facts establishing that the legislature

acted for an invalid purpose — or an approach to evaluating a program's purpose that "would cut context out of the enquiry, to the point of ignoring history." *Id.* at 864.

Regarding evidence of Section 1089's implementation, the dissent contends that because taxpayer contributions to STOs are private conduct, they are irrelevant to whether Section 1089 has a valid secular purpose. Notably, in an as-applied context, at least two circuits have considered private conduct under a government program to be probative of the program's purpose,[9] and *Winn* does not foreclose the possibility that plaintiffs can point to private conduct probative of whether Section 1089 has a secular purpose. More probative, however, is the *government* conduct on the part of the State of Arizona in implementing Section 1089.

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[9] *See Staley v. Harris County, Tex.*, 461 F.3d 504, 513 (5th Cir. 2006); *Bonham v. D.C. Library Admin.*, 989 F.2d 1242, 1244-45 (D.C. Cir. 1993). In *Staley*, the Fifth Circuit considered the community response to a government-sponsored monument of a local citizen carrying a Bible in evaluating whether the monument had a valid secular purpose. *See* 461 F.3d at 513 ("[T]he fact that the monument, with the Bible, stood without complaint [from citizens] for thirty-two years, supports the notion that the original purpose was not objectively seen as predominantly religious."). In *Bonham*, Judge Mikva, reversing the district court's dismissal under Rule 12(b)(6) of a pro se plaintiff's claim that the closing of a public library on Easter Sunday violated the Establishment Clause, observed: "In determining the legislative purpose of a law or government practice, courts generally look to . . . testimony of *parties who participated in the enactment or implementation of the challenged law or practice*, historical context, and the sequence of events leading to the passage of the law or the initiation of the practice." 989 F.2d at 1244-45 (emphasis added).

The Arizona Department of Revenue implements Section 1089 by allowing individuals to claim tax credits for contributions to private STOs. *See Winn*, 562 F.3d at 1009 ("The Supreme Court has recognized . . . that *state tax policies* such as tax deductions, tax exemptions and tax credits are *means of 'channeling . . . [state] assistance'* to private organizations . . . ." (emphasis added, ellipses in original) (quoting *Mueller*, 463 U.S. at 399)). According to plaintiffs' complaint, the Arizona Department of Revenue allows tax credits for contributions to STOs that provide scholarships only to religious schools. Individuals' contributions to STOs that discriminate on the basis of religion are not, of themselves, probative of Section 1089's purpose. The fact that the Arizona Department of Revenue gives tax credits for these contributions, however, could be probative of legislative expectations as to how state assistance under Section 1089 would be directed in practice.

Accordingly, by declining to rehear this case en banc, we appropriately rejected the suggestion that we should turn a blind eye to the history and implementation of Section 1089 simply because the statute is facially neutral.

IV. Conclusion

This case required the panel to apply *Zelman* to an educational aid program that, according to the allegations of plaintiffs' complaint, lets taxpayers choose to make state-reimbursed contributions to private scholarship organizations, but allows the

organizations to restrict access to state-funded scholarships on the basis of religion. *Winn* correctly held that such a program would not, under *Zelman*, provide parents with "genuine and independent private choice," and that the choice given to taxpayers under such a program could not be treated as the constitutional equivalent of the choice given to parents under the Ohio voucher program. Unlike the program in *Zelman*, the program alleged here neither makes scholarships available to parents on a religiously neutral basis nor gives them a true private choice as to where to utilize the scholarships. The panel correctly held that these allegations, if proven true, could establish an Establishment Clause violation. We therefore concur in the denial of rehearing en banc.

O'SCANNLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by KOZINSKI, Chief Judge, KLEINFELD, GOULD, TALLMAN, BYBEE, BEA, and N.R. SMITH, Circuit Judges:

This case involves an Establishment Clause challenge to an Arizona educational tax credit program that provides scholar- ships to students wishing to attend private schools. This case is more notable, however, for what it does not involve: state action advancing religion. The government does not direct any aid to any religious school. Nor does the government encourage, promote, or otherwise incentivize private actors to direct aid to religious schools. Rather, "state aid reaches religious schools solely as a result of the numerous independent

decisions of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002).

Unable to find any forbidden state action, the district court correctly dismissed the case on the pleadings. Sadly, our three-judge panel reversed. *See Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009). Because a program of scrupulous "governmental neutrality between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), cannot violate the Establishment Clause, I respectfully dissent from our full court's regrettable denial of rehearing en banc.

I dissent not only because *Winn* cannot be squared with the Supreme Court's mandate in *Zelman*, but also because the panel's holding casts a pall over comparable educational taxcredit schemes in states across the nation and could derail legislative efforts in four states within our circuit to create similar programs.[1] In short, the panel's conclusion invalidates an increasingly popular method for providing school choice, jeopardizing the educational opportunities of hundreds of thousands of children nationwide.[2]

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[1] *See* Fla. Stat. § 220.187; Ga. Code Ann. § 48-7-29.16; Ind. Code § 6- 3.1-30.5; Iowa Code § 422.11S; 24 Pa. Stat. Ann. 20-2005-B; R.I. Gen. Laws § 44-62-2; A.B. 279, 2009-10 Leg., Reg. Sess., § 1 (Ca. 2009); S.B. 342, 61st Leg., Reg. Sess., § 1(3)(b)-(c) (Mont. 2009); S.B. 289, 75th Leg., Reg. Sess., § 6(1) (Nev. 2009); H.B. 2754, 75th Leg., Reg. Sess. (Or. 2009).

[2] Such programs have operated without incident, perhaps because no one has thought to challenge them post-*Zelman*. *Cf., e.g., Bush v. Holmes*, 919 So. 2d 392, 399 (Fla. 2006) (explaining

I

Arizona law ("Section 1089") allows individuals voluntarily to contribute money to private, nonprofit corporations known as "student tuition organizations" ("STOs"). Ariz. Rev. Stat. Ann. § 43-1089(A). Anyone can form an STO, and there are no constraints on a taxpayer's ability to donate to an STO of his choice. Should a taxpayer elect to direct funds to an STO, that contribution is refunded via tax credits of up to $500 for individual taxpayers and up to $1000 for married couples filing jointly.[3] *Id.*

STOs use these funds to provide scholarships and tuition grants to students attending schools within the state. *Id.* § 43- 1089(G). While essentially

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that plaintiffs voluntarily dismissed a challenge to a Florida school choice program after *Zelman*).

[3] The distinction the panel tries to draw between a tax credit and a deduction, *see* 562 F.3d at 1014-15, can have no constitutional significance. Both result in a reduction of the money paid by the taxpayer to the government, with the amount of the reduction going to the designated STO. The only practical difference is that with a deduction the taxpayer must make a co-payment of his own, whereas with a credit there is no copayment. Of course, this favors richer taxpayers over poorer ones, as the former are more able to afford a personal contribution. Moreover, in a progressive tax system, deductions most favor the taxpayers with the greatest income. Not only does the value of the deduction increase with the taxpayer's marginal rate, but so does the amount of government revenue that is diverted at the taxpayer's behest. It is difficult to see why such a regressive regime (deductions) is constitutionally superior to the egalitarian tax credit. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (The Constitution "does not enact Mr. Herbert Spencer's social statics.").

any private school is statutorily eligible to receive scholarship monies,[4] STOs may choose which institutions they will support, so long as they provide funds to more than one school. *Id.*[5] Parents then decide which private school they would like their child to attend, and apply for scholarships from appropriate STOs.

In sum, the state's involvement stops with authorizing the creation of STOs and making tax credits available. After that, the government takes its hands off the wheel. Anyone can create an STO. Anyone can contribute to any STO and receive identical tax benefits. Anyone can apply for any scholarship offered by any STO.

Shortly after Section 1089's enactment, the Arizona Supreme Court held that the statute, on its face, did not violate the Establishment Clause. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999). Taxpayer plaintiffs then brought this federal action, which was dismissed by the district court under the Tax Injunction Act. *See Winn v. Killian*, 307 F.3d

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[4] Schools that "discriminate on the basis of race, color, handicap, familial status or national origin" are ineligible. *Id.* § 43-1089(G)(2).

[5] Like virtually every other tax credit system, *see supra* note 1, the Arizona statute requires STOs to provide scholarships "without limiting availability to only students of one school." Ariz. Rev. Stat. Ann. § 43-1089(G)(3). And again, like most other schemes, *see supra* note 1, the statute says STOs should allow children "to attend any qualified school of their parents' choice." *Id.* While hardly the model of clarity, this language has been interpreted to mean STOs satisfy the statue by providing scholarships to at least two schools.

1011, 1013 (9th Cir. 2002). After the suit was reinstated, *see id.* at 1020; *see also Hibbs v. Winn*, 542 U.S. 88 (2004) (affirming our opinion reversing its dismissal), the district court again dismissed the action, this time on federal constitutional grounds, *see Winn v. Hibbs*, 361 F. Supp. 2d 1117 (D. Ariz. 2005).

Plaintiffs appealed. They allege (and no one disputes) that in practice, some STOs make their scholarships available only to students willing to attend religiously affiliated schools. *Winn*, 562 F.3d at 1006. While the majority of STOs do not so limit their scholarships,[6] plaintiffs maintain that those that do receive the overwhelming majority of taxpayer contributions. *See id.* Consequently, they assert that the pool of available scholarship money is diminished for parents wishing to send their children to secular schools. *See id.* Plaintiffs contend that this disparity means Section 1089, as applied, impermissibly favors religion over nonreligion. *See id.*

The three-judge panel agreed and reversed the district court's dismissal, holding that "if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause." *See id.* at 1013. Concluding that the nature of the tax credit made taxpayer contributions tantamount to government funds, the panel found that Section 1089 potentially violated both the purpose and effects prongs of *Lemon v. Kurtzman*, 403 U.S. 603 (1971). *See id.* at

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[6] Twenty-five of the fifty-five existing STOs limit scholarship awards to religious schools.

1011-23. The fact that taxpayers directed the majority of available funds to religious schools, the panel reasoned, deprived parents of a "genuinely independent and private choice[ ]" to send their children to secular private schools. *Id.* at 1013 (internal quotation marks and citation omitted). Accordingly, Section 1089 was not a "neutral program of private choice and a reasonable observer could . . . conclude that the aid reaching religious schools . . . carries with it the *imprimatur* of government endorsement." *Id.* at 1013-14 (internal quotation marks and citation omitted).[7]

II

I have no bone to pick with the manner in which the panel frames the basic constitutional inquiry. We all understand that the Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 648-49. More often than not, the Court determines whether these commands have been violated by asking whether a "reasonable observer," who is "aware of the history and context underlying a challenged program," would conclude that the state has "endorsed"

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[7] Make no mistake about the procedural posture of this decision. True, the case will be remanded to the district court. But the panel holds that, "if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause." *Winn*, 562 F.3d at 1013. So far as I can tell, no one disputes plaintiffs' factual allegations about how the program operates in practice. Thus, the panel leaves the district court with no choice but to declare the program unconstitutional as applied, rendering the remand little more than an empty formality.

religion. *Id.* at 655 (internal quotation marks and citation omitted).

The panel's heavy emphasis on *Zelman* is also warranted. In that case, the Supreme Court upheld an Ohio school voucher program that provided tuition aid to Cleveland families on the basis of need. *Id.* at 644-45. The vouchers were distributed directly to parents, who could choose to use the scholarship money at any participating private, community, magnet, or public school. *Id.* at 645-46. The Court ruled that a "neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals" does not violate the Establishment Clause. *Id.* at 655.

It is in the application of these standards, however, that the three-judge panel lost the forest for the trees. In doing so, it reached a result that simply cannot be reconciled with *Zelman*.[8]

III

The panel is correct that a law may not have the "forbidden 'effect' of advancing . . . religion." *Id.* at 649. What the panel seems to neglect, however, is that "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding*

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[8] As the panel focused primarily on "effects," rather than "purpose," I address these two *Lemon* prongs out of order.

Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987).[9]

I must confess that I am at a loss to understand how a reasonable observer —one fully informed about all matters related to the program—could conclude that the "*government itself*" has endorsed religion in this case. Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally, parents need to apply for a scholarship for their student. In every respect and at every level, these are purely private choices, not government policy. Under such circumstances, "government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Zelman*, 536 U.S. at 652-53 (internal quotation marks and citation omitted). Only after passing through choice piled upon choice do government funds reach religious organizations.

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[9] For example, the panel asserts that Arizona parents are presented with a choice that "deliberately skew[s] incentives toward religious schools." *See Winn*, 562 F.3d at 1013 (quoting *Zelman*, 536 U.S. at 650). The actual quotation from *Zelman*, however, includes a key qualifier: it condemns only programs where "the *State* deliberately skewed incentives toward religious schools." 536 U.S. at 650 (emphasis added). Since only state action can violate the Establishment Clause, the panel's omission is telling.

That is not government endorsement: that is government nonchalance.[10]

To illustrate my point, consider the following hypothetical. Assume the exact statutory scheme embodied in Section 1089: anyone can create an STO, anyone can donate to an STO, and STOs can limit their scholarships to particular types of schools. Now imagine that only agnostics decide to create STOs. Imagine further that every STO refuses to provide tuition assistance to religious schools. In short, assume there is absolutely no money available for parents who want to send their children to a religious school. Would the parents be justified in accusing the *government* of depriving their children of school funds? Of course not.

The foregoing example plainly shows that in this case, any "endorsement" of religion arising from the disbursement of state funds to religious entities turns wholly and completely on the independent, uncoerced choices of private individuals. The system

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[10] The panel makes much of the fact that *Zelman* discussed aid flowing "directly" to parents. I submit that the Supreme Court used such terminology for two reasons. First, that was the case before the Court: it had no reason to pontificate on systems involving additional levels of private choice. Second, the language emphasized that the voucher program did not involve constitutionally problematic "direct" aid to religious institutions.

The panel turns this language into a rallying cry to suggest that by filtering aid through multiple levels of private choice—rather than a single level—the state endorses religion. But that makes no sense. How can *increasing* the separation between state and religion result in heightened government endorsement?

Arizona created could just as easily have resulted in a total dearth of funding for religious organizations as opposed to the surfeit allegedly available. This feast or famine is utterly out of the state's hands. It simply cannot be, as the panel claims, that the "scholarship *program* . . . skews aid in favor of religious schools." *Winn*, 562 F.3d at 1013 (emphasis added). The "program" does no such thing: any "skew[ing]" that occurs takes place because of private, not government action. It is axiomatic that such action cannot violate the Establishment Clause.

A

The panel however, believes that under this multi-tiered system, choice is the culprit, not the savior. After all, plaintiffs allege that it is "the choice delegated to taxpayers" which "channels a disproportionate amount of government aid to sectarian STOs [that] limit their scholarships to use at religious schools." *Id. Zelman*, the panel maintains, focused on parental choice. *Id.* at 1018. Here, however, that choice is purported impermissibly to be "constrained" by the decisions of taxpayers and STOs. *Id.* at 1016. In other words, the choices of others deprive parents of their own "independent and private choice[ ]." *Id.* at 1013 (internal quotation marks and citation omitted). They might want to send their children to secular private schools, but scholarships are not readily available for that purpose. Moreover, the panel claims the alleged abundance of funds from religious STOs creates an incentive for these parents to enroll their children in religious schools. *Id.* at 1017-18.

The panel therefore holds that Section 1089 "fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children." *Id.* at 1018 (internal quotation marks and citation omitted).

I admit that the panel's conclusion with respect to the purported lack of parental choice finds support in *Zelman*. The problem is, that support comes from Justice Souter's dissent, not the opinion of the Court. Several aspects of the majority's reasoning in that case make the *Winn* panel's conclusion infirm.

1

By focusing generally on the scope of parental choice, the *Winn* panel, like the *Zelman* dissent, is barking up the wrong tree. The question is not whether a parent's choice is somehow limited or constrained, the question is whether the *government* has somehow limited or constrained the choice.

In *Zelman*, Justice Souter accused the majority of allowing external factors to "influenc[e] choices in a way that aims the money in a religious direction." 536 U.S. at 703 (Souter, J., dissenting). Of the fifty-six private schools that participated in the Cleveland voucher program, he noted, forty-six were religious. *Id.* In his mind, this lack of a "wide array of private nonreligious options" suggested that any "choice" was not genuine. *See id.* at 703-06. Rather, he believed parents' decisionmaking process was skewed by "the fact that too few nonreligious school desks are available and few but religious schools can

afford to accept more than a handful of voucher students." *Id.* at 707. "For the overwhelming number of children in the voucher scheme," he concluded, "the only alternative to the public schools is religious." *Id.* He was not swayed by the fact that these constraints were unrelated to state action: "a Hobson's choice is not a choice, whatever the reason for being Hobsonian." *Id.* In sum, Justice Souter would have struck down the Ohio voucher program because parents' choice was influenced by factors beyond their control.

Obviously, Justice Souter's position did not carry the day. "That 46 of the 56 private schools now participating in the program are religious schools," the majority explained, "does not condemn it as a violation of the Establishment Clause." *Id.* at 655 (majority opinion). For one thing, the Court noted that the imbalance was not a function of government action. *See id.* at 656-57. Moreover, "[t]o attribute constitutional significance" to the availability of secular options, "would lead to the absurd result that a neutral school-choice program might be permissible in . . . some states [with a high concentration of secular schools], but not in other States [where religious schools are plentiful]." *Id.* at 657.[11] To avoid this absurdity, the majority held that "[t]he constitutionality of a neutral educational aid

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[11] Earlier, I listed several state programs jeopardized by the panel's holding. *See supra* note 1. Under the panel's reasoning, those schemes could be constitutional if taxpayers decided to provide more funds to secular, rather than religious STOs. An identical program might then be constitutional in one state and unconstitutional in another.

program simply does not turn on whether and why, in a particular area, at a particular time,[12] most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Id.* at 658.[13]

I see no meaningful distinction between the situation in *Zelman* and the facts of this case. Both cases involve alleged "constraints" on access to a scarce secular resource— "nonreligious [private] school desks." In *Zelman*, only ten of the participating schools were secular. *Id.* at 656. Parents were thus "constrained" by third-party decisions to fund religious, rather than secular schools. Here, while thirty out of fifty-five STOs offer scholarships to secular schools, the majority of program funds are allegedly concentrated in religious STOs. Parents are thus "constrained" by the decisions of some STOs to limit their scholarships to religious institutions, and taxpayer choices to direct their funds to those STOs. The key

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[12] The "at a particular time" reference is especially significant. As discussed above, nothing in Section 1089 precludes any Arizona taxpayer, tomorrow, from suddenly deciding to fund exclusively secular STOs. *See supra* pp. 14709-11. The Supreme Court has twice declined to strike down laws on the basis of such moving targets. *See Zelman*, 536 U.S. at 657-58; *Muller v. Allen*, 463 U.S. 388, 401 (1983).

[13] The Court went on to explain that it is "irrelevant . . . to the constitutionality" of a government aid program that "a vast majority of program benefits went to religious schools." *Zelman*, 536 U.S. at 658. The panel distinguishes this point, claiming that the *Zelman* did not involve a situation where parental choice was "constrained." *Winn*, 562 F.3d at 1017 n.14. As demonstrated below, that is simply not the case. *See infra* pp. 14728-31.

point is that in neither *Zelman* nor the case at hand are the purported "constraints" government-induced. There is simply no constitutionally significant distinction between a system where—for reasons unattributable to state action—money is available, but there are a limited number of schools to receive it, and a system where schools may be available, but there is a limited amount of money to spend. Under either scenario, as Justice Souter bemoaned, "[f]or the overwhelming number of children in the [program], the only alternative to the public schools is religious." *Id.* at 707 (Souter, J., dissenting).

I can go on. In *Zelman*, voucher funds could be used at participating public schools in districts adjacent to Cleveland. *Id.* at 645 (majority opinion). However, no such school "elected to participate." *Id.* at 647. Parental choice was therefore "constrained" by the decisions of out-of-district public school administrators. Similarly, Ohio did not require private secular schools to accept vouchers: they chose to do so. *See id.* at 656 n.4. Citing overcrowding or a desire for independence from government funds, these schools could just as easily have decided to opt out of the program. Alternatively, they could have, for whatever reason, decided to close up shop. In either scenario, parents again would be left with a reduced "choice" to send their children to private, secular schools. Did the *Zelman* Court strike down the Ohio program for impermissibly "delegating" such decisions to school administrators? Was parental choice held to be unduly "constrained"? Of course not. Instead, the Court said that the availability of a private secular

education, "in a particular area, at a particular time," was irrelevant to the constitutional inquiry. *See Zelman*, 536 U.S. at 656-60; *supra* pp. 14728.[14]

Ultimately, the panel seems to assume that parents must have the same access to "nonreligious [private] school desks" as they do to religious private school desks. But that was certainly not the case in *Zelman*, and the Ohio voucher program was upheld. Indeed, such result is unattainable in *any* program where the government is neutral with respect to religion and nonreligion. If the government takes the constitutionally required hands-off approach, external factors will define the playing field. Contrary to the panel's conclusion, the constitutional inquiry "simply does not turn" on whatever influence these factors might exert on parents. *Zelman*, 536 U.S. at 658. Again, provided there is "no evidence that the *State* deliberately skewed incentives toward religious schools," there is no Establishment Clause violation. *Id.* at 650 (emphasis added); *see supra* pp. 14723-26. As the Arizona tax credit program is just as much a program of "true private choice" as the

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[14] The *Zelman* Court's comment that the "preponderance of religiously affiliated private schools certainly did not arise as a result of the [voucher] program" is also instructive. 536 U.S. at 656-57. The Court stated that the imbalance was "a phenomenon common to many American cities." *Id.* at 657. In other words, the disparity was caused not by government action, but rather by private predilections. The same can be said about the existence of religiously affiliated STOs and the disproportionate share of taxpayer contributions they receive. The concentration of funds in religious entities –and the resulting "constraint" on parental choice –"certainly did not arise as a result of" any state action, but rather as a consequence of private decisions. *See supra* pp. 14724-26.

program in *Zelman*, 536 U.S. at 649, the panel erred in reinstating the constitutional challenge.[15]

2

In rejecting Justice Souter's position, the *Zelman* majority also emphasized that he was asking the wrong question. Rather than focusing narrowly on the challenged voucher program, the majority explained that the "Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a [voucher]." *Id.* at 655-56. Because the *Winn* panel adopts Justice Souter's overly restrictive approach, rather than assessing "*all* options" available to Arizona students, its result is similarly flawed.[16]

Indeed, the panel overtly limited its parental-choice inquiry to "the range of educational choices the STO-administered scholarship programs offer." *Winn*, 562 F.3d at 1018. It "reject[ed] the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice." *Id.* While the latter statement may be true, it is also something of a non

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[15] For this reason, the *Winn* panel's reliance on *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), is misplaced. *See Zelman*, 536 U.S. at 661-62.

[16] Interestingly, the Supreme Court decided to italicize "*all* options" in *Zelman*, and "*government itself*" in *Amos*. Maybe the justices thought these requirements were important. *Zelman*, 536 U.S. at 655-56; *Amos*, 483 U.S. at 337.

sequitur. No one claims the existence of a public school system grants a state license to ignore the Establishment Clause. The question, as *Zelman* instructs, is whether Arizona is "coercing parents into sending their children to religious schools," a question which must be answered by evaluating "*all* options" Arizona provides its schoolchildren. 536 U.S. at 655-56.

The panel did not even engage in this inquiry. Had it done so, it would have discovered that Section 1089 is but one of a "range of educational choices" available to parents of school-aged children. *Id.* at 655; *see also Kotterman*, 972 P.2d at 611 (noting that the "Arizona Legislature has, in recent years, expanded the options available in public education" and listing some of those options). Arizona's public schools must provide for open enrollment, allowing parents to send their children, tuition-free, to schools of their choice. Ariz. Rev. Stat. Ann. § 15-816.01(A). Tax credits are available for donations to public schools for "extracurricular activities or character education." Ariz. Rev. Stat. Ann. § 43-1089.01. An extensive system of charter schools "provide[s] additional academic choices for parents and pupils." *Id.* § 15-181.[17] Homeschooling is permitted and protected. *Id.* §§ 15-745, 802-03. Indeed, Section 1089 itself offers parents yet another alternative: they can create their own STO and solicit donations for use at secular private schools. These alternative

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[17] Out of the 4,000 plus charters schools across the country, 478 are in Arizona. *See* Arizona Charter Schools Association, http://www.azcharters.org/pages/schools-basic-statistics (last visited July 25, 2009).

educational opportunities mirror those the Court took into consideration in *Zelman*. *See* 536 U.S. at 655 ("Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a *nonreligious* private school, enroll in a community school, or enroll in a magnet school.").[18]

This is no Hobson's choice. Far from "coercing" parents into sending their children to religious schools, Arizona provides a wide variety of secular alternatives. "Any objective observer familiar with the full history and context of [Section 1089] would reasonably view it as one aspect of a broader undertaking . . . ." *Id.* at 655. By shutting its eyes to

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[18] As the district court observed, parents are actually *dis*couraged from sending their children to private religious schools. "An Arizona student may attend any public school without cost . . . . In contrast, the average scholarship paid by STOs in 2003 was $1,222, a sum unlikely to cover all of the costs of private school attendance." *Winn*, 361 F. Supp. 2d at 1121 (citations and footnote omitted); *see also Zelman*, 536 U.S. at 654 ("Families . . . have a financial disincentive to choose a private religious school over other schools. Parents that choose to . . . enroll their children in a private school . . . must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. [This] clearly dispel[s] the claim that the program creates financial incentives for parents to choose a sectarian school." (internal quotation marks, alterations, and citation omitted)).

the host of options available to Arizona parents, the panel's opinion directly conflicts with *Zelman*.[19]

B

As demonstrated by the foregoing arguments, the Arizona program provides parents with "true private choice." That established, the panel's discussion of taxpayer choice becomes surplusage. Indeed, is its curious focus on "taxpayer choice" an apt analogy at all? I suggest that *Winn*'s reliance on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), is utterly mistaken.

The thrust of the panel's reasoning is that taxpayer choice is not a valid substitute for the *parental* choice allegedly at the core of *Zelman*. I am not certain, however, that parental choice was as central to the reasoning of *Zelman* as the panel would have it. While that opinion does repeatedly refer to aid "recipients," *see Winn*, 562 F.3d at 1018 (listing citations), at other times, it refers only to private, nongovernmental choice, *see, e.g.*, *Zelman*, 536 U.S. at 649 (describing programs where "government aid reaches religious schools only as a

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[19] The concurrence argues that this reading of *Zelman* is inconsistent with *Nyquist*. Concurrence at 14712-13. The Court invalidated the New York tax program at issue in *Nyquist* because its tuition reimbursements were designed " 'explicitly to offer . . . an incentive to parents to send their children to sectarian schools.' " *Zelman*, 536 U.S. at 662 (quoting *Nyquist*, 413 U.S. at 782-83). As I have explained above, the plethora of choices available to Arizona parents demonstrates that Section 1089 has no effect of incentivizing religious schools over sectarian schools.

result of the genuine and independent choices of private individuals"); *id.* at 655 (stating that "no reasonable observer" would find government endorsement where "state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals"). Significantly, *Zelman* seems most concerned about preventing the state from reaching out to "grant special favors that might lead to a religious establishment." *Id.* at 652-53 (internal quotation marks and citation omitted). So long as "favors" are doled out independent of state action, the Establishment Clause—which again, prohibits the "*government itself*" from endorsing religion—is not offended.

I further submit that under the endorsement test, any level of attenuation between government action and aid to religion necessarily reduces the likelihood that a "reasonable observer" will find impermissible government approbation. There can be no doubt that taxpayer choice contributes to that attenuation. Thus, the panel's analysis of whether the choice Section 1089 provides to taxpayers ensures that " 'the circuit between government and religion was broken' " is beside the point. *Winn*, 562 F.3d at 1021 (quoting *Zelman*, 536 U.S. at 652). The self-evident fact is that by "delegating" the choice to taxpayers, the government already broke the circuit.

Nonetheless, the panel contends a reasonable observer would consider two factors when deciding whether a program of individual choice violates the Establishment Clause: the "role the person making

the choice occupies in the structure of the program," *id.* at 1020, and "whether the choice dele- gated . . . has the effect of promoting, or hindering, the program's secular purpose," *id.* at 1021. Regarding the former, the panel determined there was "no 'effective means of guaranteeing' " that taxpayers would exercise their choice " 'exclusively for secular, neutral, and nonideological purposes.' " *Id.* at 1020 (quoting *Larkin*, 459 U.S. at 125). Parents, on the other hand, have "incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations." *Id.* at 1021. As for the latter, the panel concluded that taxpayers thwarted the secular purpose of the statute insofar as their contributions narrowed the range of available educational alternatives. *Id.* at 1022.

One could see how a reasonable observer in *Larkin* could perceive government endorsement of religion from the "role the [entity] making the choice" played in the scheme. Maybe I am stating the obvious, but a large part of that perception might rest on the fact that in *Larkin*, the state delegated legislative authority—the ability to veto liquor licenses—to *churches*. *See* 459 U.S. at 125. I say again: churches. Under such circumstances it is completely unsurprising that a reasonable observer would conclude that this "joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some." *Id.* at 125-26. To what pervasively sectarian organization has Arizona "delegated" the choice at

issue in this case? The Arizona taxpayer.[20] When perceived endorsement of religion is at issue, state cooperation with churches is a far cry from state cooperation with taxpayers.[21]

Moreover, I disagree with the panel's conclusion that parents are somehow less motivated to promote religious objectives than taxpayers generally. As anyone who has grown up in a religious household will tell you, schooling decisions are as frequently made on the basis of *religious* considerations as they are on purely secular academic grounds. At the very least, sectarian considerations factor into the equation of what is in the child's best interests educationally. Thus, whether it resides with the taxpayer or the parent, once the choice is made available, the state has no "effective means of guaranteeing" that it will be exercised "exclusively for secular, neutral, and nonideological purposes." *Id.* at 125 (internal quotation marks and citation omitted). By contrast with engaging in pseudo-psychological inquires into motivation, under *Zelman*, we need only satisfy ourselves that the

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[20] Additionally, the authority delegated in *Larkin* was absolute veto power in an area of traditional government functioning. 459 U.S. at 125. Here, each individual taxpayer exercises only a modicum of control over the allocation of scholarship funds.

[21] *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), does not support the panel's analysis. In *Larkin*, legislative authority was delegated to churches. In *Kiryas Joel*, the state created a school district such that a particular religious group would have "exclusive control of the political subdivision." 512 U.S. at 698-99. Both actions displayed overt religious bias. "Delegation" to the Arizona taxpayer does not.

choice, whatever it is, is made by a private actor, not by the government.

With respect to taxpayers' ability to "thwart" the secular purpose of the statute, as discussed above, actors in *any* program of true private choice will have this ability. *See supra* pp. 14728-30. In *Zelman*, for example, the purpose of providing a broad range of educational opportunities was "thwarted" by the decisions of neighboring public-school administrators to decline program vouchers. *See supra* pp. 14729-30. The goal could be similarly "thwarted" if secular private school administrators decided to pull out of the program. *See supra* pp. 14729-30—. An inherent reality of true private choice programs cannot condemn Section 1089.

Ultimately, the panel appears to argue that Arizona's scheme is flawed because it essentially delegates to a private entity something the state could not constitutionally achieve by the exercise of its own powers; here, the promotion of religious education. *See Winn*, 562 F.3d at 1020; *see also id.* at 1021 (citing *Norwood v. Harrison*, 413 U.S. 455, 465 (1973)). That may well be true, but as the panel's own citation indicates, for that to be the case, the state must somehow "*induce*, *encourage* or *promote* private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood*, 413 U.S. at 465 (emphases added). At the risk of beating a dead horse, I repeat that the state here has done *nothing* to cajole parents, STOs, or taxpayers into supporting religious education. The state has simply said, if you donate to the STO of your choice,

you get a tax credit. Such action in no way induces, encourages, or promotes private parties to aid religion.[22]

IV

The panel also holds that plaintiffs have alleged facts suggesting Section 1089 was not "enacted for . . . [a] valid secular purpose." *Winn*, 562 F.3d at 1011 (internal quotation marks and citation omitted). The panel reaches this conclusion despite conceding that the statute is facially neutral with respect to religion. *See id.* at 1011-12. Nothing in the legislative history suggests that the driving force behind the bill was anything other than the desire to provide "equal access to a wide range of schooling options for students of every income level." *Id.*; *see also Mueller*, 463 U.S. at 395 ("A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable."). Nonetheless, the panel maintains that plaintiffs could prove, based on how Section 1089 operates in practice, that this "secular and valid" purpose is a sham. *Winn*, 562 F.3d at 1011-12.

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[22] The concurrence asserts that "[t]he effect of these taxpayer choices . . . may be to *harm* the ability of aspiring scholarship recipients to obtain a scholarship available for use at a secular school." Concurrence at 14716. I fail to see how Section 1089—which permits tax deductions for gifts to both religious and secular scholarship funds—harms a student's ability to obtain a scholarship to a secular school.

From its citation to *McCreary County v. ACLU*, 545 U.S. 844 (2005), the panel seems to argue that the very enactment of Section 1089 "bespoke" a religious purpose. *Winn*, 562 F.3d at 1012. But how can this be so? *McCreary* does say that government action can be so "patently religious" that its nonsecular nature is evident. 545 U.S. at 862. The examples provided, however, are situations where the state mandated Bible study, the teaching of creationism, and prayer in schools. *Id.* at 862-63. Setting up a tax credit program to provide scholarships to children generally is hardly of the same ilk.

To the extent the panel claims that the manner in which Section 1089 has been *implemented* reveals the stated secular purpose to be a sham, their arguments are similarly unpersuasive. First, the Supreme Court has recognized that a "legislature's stated reasons will generally get deference," deference only abandoned in "those unusual cases where the claim was an apparent sham." *Id.* at 864-65. Nothing in the plaintiffs allegations suggest this is one of those "unusual cases," and as setting up a tax credit program is not a "patently religious" act, there is nothing "apparent" about any purported sham. Second, the implementation inquiry centers on actions taken by the *government*. *See id.* at 862 (stating that the inquiry turns on the "traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act") (internal quotation marks and citations omitted); *id.* at 870-74 (questioning the government's newly proffered purposes after it

altered a Ten Commandments display in an attempt to mitigate previously stated sectarian purposes). Here, the alleged impropriety arises from taxpayer, not government action. Third, the panel's holding turns on plaintiff's allegation that "in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools." *Winn*, 562 F.3d at 1012. But that result is apparent from the statute itself, which is satisfied so long as STOs provide scholarships to two or more schools, *see supra* note 5, a fact plaintiffs themselves recognize in their complaint. That an STO may independently decide to limit its scholarships *does not* make a *religious* purpose "apparent."[23]

Ultimately, the crux of the panel's purpose holding turns on matters previously discussed under the effects prong: a nonsecular purpose could be inferred from the fact that, at a given moment, the bulk of scholarship money is available only for use at religious schools. But as detailed above, money flows to religious institutions entirely at the whim of nongovernmental actors: taxpayers or STOs. The legislature could hardly have had the "purpose" of endorsing religion when it set up a plan that, for all it knew, could have resulted in absolutely no funding for religious entities. *See supra* pp. 14723-26. This moving target is irrelevant to the Establishment Clause inquiry. *See supra* pp. 14727-31.

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[23] Additionally, any inquiry into purpose must look at context. *See McCreary*, 545 U.S. at 862, 864, 866. As discussed above, Section 1089 was enacted amidst a broader effort to increase alternative educational opportunities. *See supra* pp. 14730-33; *see also Kotterman*, 972 P.2d at 611.

V

The layer upon layer of private choice built into this program ensures that "the circuit between government and religion [is] broken." *Zelman*, 536 U.S. at 652. Try as it may, the panel cannot complete such circuit. Ultimately, nothing in the panel opinion grapples with the fact that Arizona does nothing to encourage, to promote, or otherwise to incentivize private actors to direct aid to religious schools. Nothing explains how "the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Nothing points to any "evidence that the *State* deliberately skewed incentives toward religious schools." *Zelman*, 536 U.S. at 650 (emphasis added). Nothing shows how Section 1089 enables Arizona to "grant special favors that might lead to a religious establishment." *Id.* at 652-53 (internal quotation marks and citation omitted).

But the three-judge panel can hardly be faulted for these omissions: it cannot manufacture what does not exist.[24] What does exist is a tax credit system that relies entirely on private choice. Individuals choose to create an STO. STOs choose to

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[24] *Cf. Compassion in Dying v. Washington*, 85 F.3d 1440, 1446-47 (9th Cir. 1996) (Trott, J., dissenting from denial of rehearing en banc) ("No magician—not David Copperfield, not even Harry Houdini—can produce a rabbit from a hat unless the rabbit is in the hat to begin with. Moreover, if a hat does not contain such an animal, a magician cannot claim that anything he is able to produce from it is in fact a rabbit, no matter how sincere he may be or how great his forensic skills. All of this has something to do with basic physics.").

limit their funds to certain schools. Taxpayers choose to donate. Parents choose to apply for scholarships. In truth, *everyone* in Arizona has a choice—everyone except the government. No *reasonable* observer would think this lengthy chain of choice suggests the government has endorsed religion.

Because the three-judge panel's decision strays from established Supreme Court precedent, and because it jeopardizes the educational opportunities of thousands of children who enjoy the benefits of Section 1089 and related programs across the nation, I must respectfully dissent from our court's regrettable failure to rehear this case en banc.

U.S. CONST. AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Arizona Revised Statutes Annotated Currentness
Title 43. Taxation of Income
Chapter 10. Individuals
Article 5. Credits

§ 43-1089. Credit for contributions to school tuition organization; definitions

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions by the taxpayer or on the taxpayer's behalf pursuant to § 43-401, subsection H during the taxable year to a school tuition organization, but not exceeding:

1. Five hundred dollars in any taxable year for a single individual or a head of household.

2. Eight hundred twenty-five dollars in taxable year 2005 for a married couple filing a joint return.

3. One thousand dollars in taxable year 2006 and any subsequent taxable year for a married couple filing a joint return.

B. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

C. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not

used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

D. The credit allowed by this section is in lieu of any deduction pursuant to section 170 of the internal revenue code and taken for state tax purposes.

E. The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer.

F. A school tuition organization that receives a voluntary cash contribution pursuant to subsection A shall report electronically to the department, in a form prescribed by the department, by February 28 of each year the following information:

1. The name, address and contact name of the school tuition organization.

2. The total number of contributions received during the previous calendar year.

3. The total dollar amount of contributions received during the previous calendar year.

4. The total number of children awarded educational scholarships or tuition grants during the previous calendar year.

5. The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.

6. For each school to which educational scholarships or tuition grants were awarded:

(a) The name and address of the school.

(b) The number of educational scholarships and tuition grants awarded during the previous calendar year.

(c) The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.

G. For the purposes of this section:

1. "Handicapped student" means a student who has any of the following conditions:

(a) Hearing impairment.

(b) Visual impairment.

(c) Developmental delay.

(d) Preschool severe delay.

(e) Speech /language impairment.

2. "Qualified school" means a nongovernmental primary school or secondary school or a preschool for

handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

3. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under section 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer; DIANE AND MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxp Plaintiffs, vs. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV 00-0287 PHX EHC COMPLAINT

FILED: February 15, 2000

Plaintiffs, by and through their counsel undersigned, hereby make the following complaint against Defendant:

Parties

1. Plaintiffs, Kathleen M. Winn, Diane and Maurice Wolfthal, and Lynn Hoffman, are citizens and residents of Arizona, who pay Arizona income taxes on income earned in Arizona.

2. Defendant Mark W. Killian is Director of the Arizona Department of Revenue. Defendant Killian is responsible under state law for the administration of Arizona's income tax laws, including A.R.S. § 43-1089, the constitutionality of which is challenged in this action.

Jurisdiction

3. Plaintiffs allege that A.R.S. § 43-1089, on its face and as administered by Defendant Killian, deprives them of rights guaranteed by the First and Fourteenth Amendments CD to the United States Constitution. Plaintiffs seek relief pursuant to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a), and venue pursuant to 28 U.S.C. § 1391(b).

Factual Allegations

4. Plaintiffs challenge the constitutionality, on its face and as applied, of A.R.S. § 43-1089, enacted in 1997. A copy of A.R.S. § 43-1089 is attached to this complaint as Exhibit A.

5. A.R.S. § 43-1089 provides for a "tuition tax credit," such that any taxpayer who pays Arizona income taxes may satisfy up to $500 of his, her, or its annual state income tax obligation by paying that amount to a "school tuition organization" ("STO") instead of to the State.

6. Pursuant to A.R.S. § 43-1089, an STO must, in turn, use at least 90% of the payments it receives from taxpayers for tuition grants to children to attend private primary or secondary schools in Arizona.

7. Taxpayers who make payments to any STO in a given tax year receive a 100%, dollar-for-dollar credit on the state income taxes that are due from them for that year, i.e., they may reduce the income tax paid to the State for that year by the entire amount, up to $500 per year, paid to an STO.

8. Taxpayers are not required to have children in school or to have incurred any educational expenses (or any other expenses) in order to claim the 100% tax credit for payments made to STOs.

9. The amounts paid to STOs by taxpayers and claimed by taxpayers as credits toward payment of Arizona income taxes are not contributions oftaxpayer funds to the STOs, because taxpayers incur no cost in making such payments. The amounts are, instead, contributions of state funds to the STOs, because the amounts paid to STOs reduce state income tax revenues on a dollar-for-dollar basis.

10. A.R.S. § 43-1089 places no limit on the total amount of State funds that may be diverted to STOs each year. If one million Arizona taxpayers utilized the STO credit each year, the amount of State income tax revenues annually diverted to STOs would be $500 million.

11. STOs must make tuition grants of State funds available to students at more than one non-public school. As long as they do so, STOs may (and most do) restrict their grants to students attending religious schools. An STO may, for example, make tuition grants of State funds available only to children attending Catholic schools, only to children attending Lutheran schools, only to children attending Christian schools or only to children attending Jewish schools. STOs may also restrict their grants of State funds only to children of a specific religious denomination, for example, Catholic

children, Lutheran children, Christian children or Jewish children.

12. STOs that restrict their grants to students attending religious schools use state funds solely for the purpose of enabling children to attend religious schools at State expense.

13. A.R.S. § 43-1089 thus authorizes the formation of agencies that have as their sole purpose the distribution of State funds to children of a particular religious denomination or to children attending schools of a particular religious denomination.

14. The money used by STOs for grants to students attending religious schools would otherwise have been paid into the state general fund by the taxpayers making those donations. The diversion of those funds to such STOs therefore reduces the balance of the state general fund on a dollar-for-dollar basis.

15. As of the end of August, 1999, 15 STOs had reported data to the Arizona Department of Revenue regarding funds received and/or tuition grants awarded during calendar year 1998. Of the total of $1,815,799 received from taxpayers by all STOs in 1998, at least $1,708,769, or 94%, went to STOs restricting tuition grants of state funds to students attending religious schools.

16. The largest STO recipient of income tax revenues during the 1998 calendar year was The Catholic Tuition Organization of the Diocese of Phoenix, which received $837,140. The Catholic Tuition Organization restricts its grants to students attending Catholic schools in the Diocese of Phoenix. Eligible schools include, for example, Saint Mary's High School. The advertised mission of Saint Mary's is "to provide a quality Catholic education by developing and sustaining a rich tradition grounded in Gospel and family values ..." Another eligible school is St. Louis the King School, which advertises that "Gospel values and self-discipline skills are infused into the total curriculum." Another eligible school, St. John Vianney School, advertises that Christ "is the unseen but ever present teacher in its classes."

17. The second largest STO recipient of income tax revenues was Arizona Christian School Tuition Organization, which received $538,611. The Arizona Christian School Tuition Organization restricts its grants to students attending "evangelical" Christian schools in Arizona.

18. The third largest STO recipient of income tax revenues was Brophy Community Foundation, which restricted grants to children attending two Catholic schools (Brophy College Preparatory for boys and Xavier College Preparatory for girls) and

which received $163,603. The advertised philosophy of Xavier College Preparatory includes such goals as "instill[ing] a knowledge of the truths of faith, enlightened by the post-Conciliar teachings of the Church." Brophy College Preparatory's advertised mission includes the goal of offering students "an intimate relationship with God" through "the process of nurturing the soul."

19. The three religious STOs described above, which controlled 85% of the total STO donations during 1998, made no scholarship grants at all during that year. Despite the unavailability of that significant pool of funds, 75% of the scholarship funds granted by STOs in 1998 were granted to students attending religious schools, and 79% of the schools receiving scholarships were religious schools.

20. During 1998, the STO making the largest amount of tuition grants was Christian Scholarship of Arizona; the STO making the second largest amount of grants was Northern Arizona Christian School Scholarship; the STO making the third largest amount of grants was Higher Education Lutherans Program.

21. The school receiving the largest amount of STO funded tuition payments during 1998 was the Casas Adobes Baptist School in

Tucson; the school receiving the second largest amount was the Palo Verde Christian School in Tucson; the schools receiving the third and fourth largest amounts were the Son Rise Christian School and the Sedona Christian School. Each o these schools is pervasively sectarian.

22. Upon information and belief, STOs received and granted a much larger amount of income tax revenue for calendar year 1999, due in part to the absence of any constitutional attack on the program for most of the year and to the public's greater familiarity with the program. Upon information and belief, the Catholic Diocese of Phoenix collected more than $4.5 million for its STO during 1999. The Catholic Diocese of Tucson recently announced that it had collected more than $850,000 for its STO during the same time period, and the Brophy Community Foundation announced that its 1999 donations exceeded $640,000.

23. Except for a statutory prohibition on making grants to children attending schools that discriminate on the basis of race, color, handicap, familial status or national origin, STOs may utilize any standards they wish for making tuition grants of State funds to students attending non-public schools, including preferences for students of a particular religious denomination. STOs need not make grants on the basis of

financial need or academic performance. STOs may also make grants to students attending schools that discriminate on the basis of religion and/or sex in accepting students.

24. Religious schools that receive tuition payments made with STO-granted State funds may and do use those payments to support religious instruction and worship. Those schools and the STOs that support them encourage taxpayers to take advantage of the tax credit program in order to further religious education.

25. A.R.S. § 43-1089 *does not require or insure* that tuition grants of State funds will be available to parents choosing to send their children to non-religious, non-public schools.

26. Because a very large majority (at least 94% in 1998) of STO funds are controlled by religion-specific STOs, parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing and able to make a tuition grant to a student attending the non-religious school of the parents' choice. The tax credit scheme is, therefore, not religion-neutral in its operation.

27. Although A.R.S. § 43-1089(D) prohibits a taxpayer from designating his or her donation for the benefit of any dependent of

the taxpayer, the statute does not prohibit two taxpayers from each designating his or her donation for the benefit of the other taxpayer's child, or a taxpayer from designating his or her donation for the benefit of a non-dependent relative (for example, a grandchild).

28. The statute also does not prohibit, for example, two or more religious schools from setting up an STO (like the Brophy Community Foundation, which serves two Catholic schools) and inviting parents to participate in a "contribution exchange," by which each of their children would receive a $500 scholarship paid for by another participating parent. All parents would then be fully reimbursed for their contributions by the State of Arizona.

Allegations of Law

29. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at religious schools, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

30. By affirmatively authorizing and permitting STOs to use State income-tax revenues to make tuition grants to students attending only religious schools or schools of only one.

religious denomination or to students of only one religion, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

31. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at schools that discriminate on the basis of religion in selecting students, § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

32. As *a direct consequence* of Defendant Killian's violation of Plaintiffs' constitutional rights, Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program described above.

33. Prior litigation was filed in the Arizona Supreme Court challenging the constitutionality of A.R.S. § 43-1089 (Kotterman v. Killian, 972 P.2d 606, cert. denied, _ S. Ct. _ (1999)). Plaintiffs' Complaint is not barred by res judicata because, among other things, neither Plaintiffs nor the Arizona Civil Liberties Union were parties to or controlled or directed the prior state court litigation, and no challenge was made in that litigation

based on the actual practical effect of the statutory scheme, as the lawsuit was filed prior to the effective date of the statute.

Relief

Wherefore plaintiffs respectfully request:

A. Preliminary and permanent injunctive relief prohibiting defendant from allowing taxpayers to utilize the tax credit authorized by A.R.S. § 43-1089 for payments made to STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion;

B. A declaration that A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution by affirmatively authorizing STOs to use State income-tax revenues to pay tuition for students attending religious schools or schools that discriminate on the basis of religion; and

C. An order that Defendant Killian inform all STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion, that all funds in their possession as of the date of this Court's

order must be paid into the state general fund.

D. An award of attorneys' fees, expert fees, if any, and other costs, pursuant to 42 U.S.C. § 1988(b) and (c), the private attorney general doctrine, and any other applicable authority or rule of equity.

E. All other relief that this Court deems just and appropriate in the circumstances.

DATED this 15th day of February, 2000.

/s/ Marvin S. Cohen
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OPPOSITION BRIEF

(3) (5) (4)

Nos. 09-987, 09-988, 09-991

FILED

APR 23 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.,
Petitioners,

—v.—

KATHLEEN M. WINN, et al.,
Respondents.

ARIZONA SCHOOL CHOICE TRUST, et al.,
Petitioners,

—v.—

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,
Petitioner,

—v.—

KATHLEEN M. WINN, et al.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the complaint in this case, which alleges pervasive religious discrimination in awarding scholarships in Arizona's unusual tax-credit school-voucher program, states a claim upon which relief can be granted.

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STATEMENT OF THE CASE

Introduction

We emphasize at the outset that Arizona's program is quite unlike tax-credit or school voucher programs in other states, and also unlike the program upheld by the Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the case on which petitioners and their *amici* principally rely. Unlike those programs, the Arizona program uses religious organizations to award most of its scholarships, and it permits those organizations to require that parents enroll their children at religious schools in order to receive state scholarship aid. That pervasive religious discrimination in the way scholarships are awarded - - a feature unique to the Arizona program - - is the basis of respondents' case.

In *Zelman*, the state issued tuition vouchers to parents of children living in a public school district whose schools had been "among the worst performing . . . in the Nation." 536 U.S. at 644. The vouchers were issued on the basis of financial need. The purpose of the *Zelman* program was to give children from low-income families the chance to escape a failed public-school system. The program was upheld because it served this important secular purpose, because it was, in design and operation, "entirely neutral with respect to religion," and because it gave parents receiving vouchers the unfettered right to choose the school at which to use the voucher. 536 U.S. at 649-650, 653, 662.

The Arizona program is different in every one of these respects. If the allegations in respondents' complaint are taken as true, as they must be at this stage of the case, the Arizona program is neither based on financial or academic need nor neutral with respect to religion. Instead, it awards most of its scholarships to the children of middle-class and wealthy parents on the *basis* of religion. Most parents who receive Arizona program scholarships, moreover, have no choice about where to use them, because most scholarships can only be used at specific religious schools. We are aware of no program in any other state that contains these unconstitutional features.

The court of appeals has held that respondents' factual allegations state a claim under the Establishment Clause, and that respondents should be given an opportunity to prove the truth of their allegations. No temporary or preliminary injunctive relief has been requested or given. This completely unexceptionable decision does not conflict with the decision of any other federal court of appeals or with the decision of any state supreme court. Because it is based on features unique to the Arizona program, the decision below does not call into question the constitutionality of programs in other states. The decision is, in addition, clearly correct. The petitions for certiorari should be denied.

The Arizona Program

Tax-related school-choice programs ordinarily permit *parents* to claim tax credits or tax deductions for their own educational expenses on behalf of their children - - expenses such as tuition, the cost of books

and supplies, and transportation costs. Programs of that kind offer all parents who send their children to non-public schools the opportunity to defray some of those educational expenses.

Arizona's tax-credit program is completely different. Arizona tax credits do not permit parents with children in non-public schools to defray some or all of their costs for private education. Parents with children in religious or private schools are actually *forbidden* by the Arizona statute to claim tax-credits for their own educational expenses. Ariz. Rev. Stat. Ann. (A.R.S.) § 43-1089(E). (The text of § 1089 is reproduced on pages 112a-115a of the Petition in 09-987.) The parents who benefit from Arizona's program are those relatively few who are fortunate enough to be chosen to receive scholarships by one of Arizona's "school tuition organizations" (STOs) - - non-governmental organizations that the state has authorized to award the program's scholarships on the state's behalf.

Arizona scholarships are funded through a system of state income-tax credits that are given for "contributions" that taxpayers make to STOs. These credits can be used by *any* Arizona individual income-tax payer, regardless of whether the taxpayer is a parent with children in school or has any educational expenses whatsoever. A.R.S. § 43-1089(A). The Arizona credits are not tax deductions that require the taxpayer to make a contribution of his or her own funds for a charitable purpose. They are dollar-for-dollar tax credits that taxpayers can use to satisfy up to $500 or $1,000 (depending upon whether single or married) of their annual state individual-income-tax

liability. *Id.* The credits cost the taxpayers who use them nothing; the cost of the credits is borne entirely by the state's general fund. The Arizona program is therefore not a program of private taxpayer charity. It is a program that uses state revenues for a state purpose, at no cost to the taxpayers whose use of the credits finances the program.

The Arizona school tuition organizations that receive tax-credited payments from taxpayers are required by statute to use them to award scholarships that are usable only at non-public schools. A.R.S. § 43-1089(G)(2-3). STOs are private organizations, now about 50 in number, that have been established, pursuant to the Arizona program, for the purpose of making scholarship awards from the tax revenues that they receive directly from taxpayers on the state's behalf. *Id.* The STOs that award most of Arizona's scholarships are religious organizations. See Petition in 09-988 at App. 221-App. 222.

Having chosen to use non-governmental organizations, rather than a state agency, to award scholarships from state funds on its behalf, the Arizona Legislature might have been expected to establish scholarship standards that would further its purported educational purposes - - standards requiring that aid be given to children from low-income families, for example, or to children who are not being adequately served by the public school system. The Arizona program contains no such standards. Arizona STOs are free to - - and do - - award scholarships on any basis they choose. The result is that a majority of children who receive Arizona program scholarships are children of middle class or wealthy families - - children

who were already attending private or religious school when the state scholarship was first awarded to them. See Lucas, *The Arizona Scholarship Tax Credit*, Goldwater Institute Policy Report No. 186 (Dec. 11, 2003). (The Goldwater Institute has filed an *amicus* brief in support of the Petition in 09-988.)

Arizona STOs are not prohibited from awarding scholarships on the basis of religion or sex. These are discriminations in which the state would, of course, be forbidden to engage if it awarded the scholarships itself. The Arizona statute prohibits schools that scholarship students attend from discriminating "on the basis of race, color, handicap, familial status or national origin." A.R.S. § 43-1089(G)(2). That provision, however, was intentionally drafted so as not to prohibit the schools from discriminating on the basis of religion or sex in selecting students. The Arizona statute also permits the schools that scholarship students attend to require scholarship students participate in worship services, to take classes in religion, and to participate in all the other religious activities required of non-scholarship students.

Religious schools and organizations have aggressively and openly taken advantage of the Arizona program to further their religious educational goals. The web site of intervenor Arizona Christian School Tuition Organization (ACSTO), for example, describes ACSTO's goal as being "to further Christian education by effectively implementing the provisions of this law for the benefit of Christian school students and their families." ACSTO, acsto.org (last visited Apr. 20, 2010). The web site urges taxpayers "looking for new ways to support Christian education" to do so by

"taking advantage of Arizona's unique opportunity to receive a dollar-for-dollar credit against their Arizona state income tax." *Id.* The web site of the Jewish Tuition Organization (JTO), which has filed an *amicus* brief in support of the petitions in this case, explains that, "[w]ith Arizona's scholarship tax credit you can send children to our community's Jewish day schools and it won't cost you a dime![1] When you support the Jewish Tuition Organization, you receive a dollar-for-dollar tax credit up to $1,000 if you are married or $500 if you are single. Best of all, your donation provides [an] outstanding secular and Jewish education to children who would otherwise be unable to attend a Jewish day school." JTO, jewishphoenix.org (last visited Apr. 20, 2010). The Chabad Tuition Org. (CTO) web site asks taxpayers to "imagine giving Tzedakah [charity] with someone else's money. . . . Stop imagining, thanks to Arizona's laws you can!" CTO, chabadaz.com (last visited Apr. 20, 2010). The web sites and mailings of the other Arizona religious STOs contain identical or similar assertions that Arizona law has been designed to let parishioners and others pay for other people's children to attend religious schools at the state's expense.

STO scholarships must allow children "to attend any qualified school of their parents' choice." A.R.S. § 43-1089(G)(3). That language, on its face, would seem to prohibit religious STOs from awarding scholarships

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[1] Although telling taxpayers that "contributions" to JTO "won't cost you a dime," JTO's *amicus* brief nevertheless argues here that the decision below "erred in suggesting that '[a] tax-credit eligible contribution to an STO costs the taxpayer nothing.' " JTO brief, p. 12, n. 7.

that are usable only at religious schools. Section 43-1089(G)(3) also requires, however, that STOs "shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school." Apparently relying on this additional language, the Arizona Department of Revenue has, from the outset of the program, allowed religious STOs to award scholarships that can only be used in religious schools. Religious STOs take full advantage of this permission.

Respondents filed their complaint in this case after data about the first calendar year of full operation of the Arizona program became available. That data showed that 94% of the tax-credited funds that year was contributed to religious STOs that awarded scholarships usable only at religious schools. See Respondents' Complaint, ¶ 15, Petition in 09-987 at 120a. The Arizona program has increased enormously in size since then, with a corresponding increase in scholarships usable only at religious schools. In 2008, the last year for which data was available at the time this brief was written, more than $55 million in tax credits was claimed for taxpayer payments to STOs. See Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, Executive Summary.[2] Most of this money went to STOs that will use it toward scholarships that can only be used at religious schools.

The STO receiving and awarding the most tax-

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[2] *Available at* azdor.gov/portals/o/reports/private-school-tax-credit-report-2008.pdf.

credited funds in 2008 was intervenor ACSTO. It received more than $11.5 million and awarded almost $11 million in scholarships. *Id.* at 8. Those scholarships can be used only at Christian schools. The second largest STO recipient was the Catholic Tuition Organization of the Diocese of Phoenix. It received more than $9 million and awarded more than $10 million in scholarships. Those scholarships can only be used at Diocese schools. *Id.* These two religiously-affiliated STOs together received and awarded almost 40% of the Arizona program's scholarship funds in 2008. Other religiously affiliated STOs received and awarded at least an additional $15 million. Because the large majority of state scholarship funds is thus controlled by STOs that award scholarships usable only at religious schools, "parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing to make a tuition grant to a student attending the non-religious school of the parents' choice." Complaint, ¶ 26, Petition in 09-987 124a.

Other aspects of the Arizona program reinforce both its lack of religious neutrality and its failure to serve the secular purposes for which it was supposedly enacted. The program, for example, permits taxpayers to designate students as scholarship recipients when they make "contributions" to STOs (so long as the designee is not the taxpayer's dependent). See A.R.S. § 43-1089(E). With STO cooperation, affluent taxpayers use this feature of the program to "swap" contributions so that the state will pay part of their children's religious-school tuition. Two sets of parents will each make a "contribution" to an STO and designate that

payment as tuition for the other parents' child. As a result, the state pays religious-school tuition for both children. Parents with children in religious school can similarly ask relatives and friends to make "contributions" to a religious STO and to designate those amounts for their child, so that the state pays part or all of their child's tuition. Complaint ¶¶ 27-28.

The failure of the Arizona program to serve its purported secular purposes is not a secret. Two newspapers - - the Arizona Republic, the state's largest newspaper, and the East Valley Tribune - - have each recently published a comprehensive series of investigative articles about the program's failing operation.[3] Here is a sample of what these investigative articles describe:

> • In operation, the Arizona program displays "lack of oversight, double-dipping into state funds, manipulating the system for personal and . . . financial gain, and failure to benefit the poor." Ronald J. Hansen & Pat Kossan, *The Tuition Tax Credit: Tuition aid Benefits Wealthy Families, Raises Worry*, Ariz. Republic, Aug. 1, 2009, azcentral.com.
>
> • The executive director of an STO that received more than $6 million in contributions in 2008 said that "about 70

[3] The full series of Arizona Republic articles is available at azcentral.com, using the search phrase "the tuition tax credit". The East Valley Tribune series can be found at www.eastvalleytribune.com/page/taxcredits.

percent of her scholarships in 2008 went to those who are not considered low-income and at least 9 percent [to] those who could be considered wealthy." Overall, her organization targets the middle class. "That's who we cater to . . . I would be very disappointed to see a (low-income) group as a target." *Id.*

• In a 2003 survey, the Goldwater Institute, a conservative think tank that has filed an amicus brief in this case and that has ties to intervenor Arizona School Choice Trust, found that "87 percent of the scholarship students helped by 18 school tuition organizations were already enrolled in private school before the aid." *Id.*

• Arizona tax credits have "largely failed to expand access to private education for low- and middle-income families, as lawmakers promised . . . [and] blatantly violate the few regulations that lawmakers included in the statute . . . ." Ryan Gabrielson, *School Tuition Organizations Unaccountable*, E. Valley Trib., Aug. 1, 2009. eastvalleytribune.com/story/142256.

• A majority of tax credit donations are "earmarked to give scholarships to students already enrolled in private

schools, no matter how much money their parents earn." Ryan Gabrielson & Michelle Reese, *Private School Credits Rife with Abuse*, E. Valley Trib., Aug. 2, 2009, *available at* 2009 WLNR 14919217.

- At two of the largest STOs, executives, one of whom is a member of the state legislature who has been the most prominent legislative proponent of the Arizona program, "have used tax credit donations to enrich themselves, buying luxury cars, real estate and funding their own outside for-profit businesses." *Id.*

- Some of the program's chief proponents agree that religious and other private schools "have used the infusion of millions of income tax dollars to increase tuition, rather than the diversity of their campuses." *Id.*

- Counsel of Record for amicus Goldwater Center, who was instrumental in establishing the Arizona program, has concluded that "This is horrible. . . This is not the program I fought for." *Id.*

After these articles were published, legislative task forces were established. See Ryan Gabrielson, *Lawmakers Call for School Tax Credit Probe*, E. Valley Trib., Aug. 11, 2009, www.eastvalleytribune.com/story/142824. No relevant

legislation had resulted at the time this brief was written. The "reform" proposal that seems to have the greatest chance of enactment at the current legislative session would remove the requirement that payments to STOs be made during the calendar year for which a credit is claimed, and permit taxpayers to wait to make those payments until they file their tax return for that year. See S.B. 1274, 49th Leg., 2d Reg. Sess., Senate Engrossed Version.

The Decision Below

Respondents' district court complaint asked that the Director of the Arizona Department of Revenue be prohibited in the future from awarding tax credits for payments to STOs that award scholarships on the basis of religion, or that award scholarships usable only at religious schools. The Director moved to dismiss for lack of federal jurisdiction. The district court granted the motion. The court of appeals reversed, *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), and this Court affirmed, *Hibbs v. Winn*, 542 U.S. 88 (2004).

On remand, the district court permitted intervention as defendants by Arizona Christian School Tuition Organization (ACSTO), the state's largest STO, and the Arizona School Choice Trust, a non-religious STO. All three defendants moved for dismissal on the ground that the complaint did not state a claim upon which relief could be granted. The district court again dismissed, *Winn v. Hibbs*, 361 F.Supp. 2d 1117 (D.Ariz. 2005), and the court of appeals again reversed, *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009). No temporary or

preliminary injunctive relief has been requested by respondents at any stage of the litigation, and none has been given.

Judge Fisher's opinion for the unanimous court of appeals panel holds that respondents' allegations that Arizona's tax-credit funded scholarship program "lacks religious neutrality and true private choice in making scholarships available to parents" are "sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause of the United States Constitution." Petition in 09-987, 3a. Respondents' allegations, if proved, could show that defendants' claim "that Section 1089 was enacted primarily to provide Arizona students with equal access to a wide range of schooling options" was "a pretense." *Id.* at 19-20a. In addition, "if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause by delegating to taxpayers a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.'" *Id.* at 21a. Such a program would channel "a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools . . . requiring parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education." *Id.* at 21a-22a. A reasonable observer could also "conclude that the aid reaching religious schools under this program 'carries with it the *imprimatur* of government endorsement.'" *Id.* at 22a. Rehearing *en banc* was denied, with eight

dissents. *Id.* at 62a.

ARGUMENT

The decision below does not conflict with the decision of any other court of appeals or with the decision of the highest court of any state. It is a fact-specific interlocutory ruling that concerns the administration of an unusual Arizona program that uniquely combines a failure to serve a significant secular purpose with a lack of religious neutrality. If the Arizona program operates as respondents allege that it does, respondents contend that it would violate the Establishment Clause. The decision below holds that respondents should have an opportunity to prove the truth of their factual allegations. Preliminary injunctive relief has neither been requested nor issued, and the pendency of this litigation threatens no school-choice programs in other states. There is no occasion for the Court's review of this unexceptionable ruling.[4]

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[4] Petitioner ACSTO contends that respondents lack standing because Arizona's allegedly unconstitutional expenditure of tax revenues occurs before, rather than after, the revenues reach the state treasury. Petition in 09-987, 5-21. This odd contention has no merit. Taxpayer standing to challenge a state spending program as a violation of the Establishment Clause depends, not upon whether funds technically pass through the state treasury, but upon whether taxpayers have a "financial interest that is, or is threatened to be, injured by the unconstitutional conduct." *Doremus v. Bd. of Educ.*, 342 U.S. 428, 435 (1952). If petitioner's standing contention were correct, taxpayers would not have had standing to bring the Establishment Clause challenges that were adjudicated on the merits by this Court in *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deductions), *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (tax exemptions), or *Comm. for Public Educ. &*

A. There is No Conflict.

Petitioners do not suggest the existence of a conflict between the decision below and the decision of any other federal court of appeals. Their contention is that the decision below conflicts with the decision of the Supreme Court of Arizona in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999). That contention is incorrect.

Kotterman was a *facial* challenge to the Arizona program involved in this case. The *Kotterman* complaint was filed, and the case was decided, on the basis of the statutory text, before the program began full operation. The present case, by contrast, is an *as-applied* challenge, not to the statute's text, but to the program as it actually operates. The features of the program's operation that are the primary bases of respondents' challenge - - the award of scholarships that can be used only in religious schools by religious organizations, the effect of that religious discrimination on parental choice, and the failure of the program to achieve its purported secular objectives - - could not have been challenged in *Kotterman*. The *Kotterman* court actually appears to have expressly (and it turns out incorrectly) assumed that the Arizona program would be religiously neutral in operation. See *Kotterman*, 972 P.2d at 614: ("Every STO must allow its scholarship recipients to attend any qualified school of their parents' choice.")

Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (tax credits).

B. Existing or Proposed School Voucher or Tax-Credit Programs in Other States Are Not Affected by the Decision Below.

Petitioners suggest that the decision below casts a "constitutional cloud" on school-choice programs in other states. See Petition in 09-991, 30-31; Petition in 09-988, 34-35. That "cloud" is imaginary. The programs in other states to which petitioners refer do not contain the religiously discriminatory practices that make the Arizona program unconstitutional.

In 2009, the United States Department of Education issued a Report on existing state voucher, tuition tax-credit and similar school-choice programs in the United States. See U.S. Dept. of Educ., *Education Options in the United States, State Programs that Provide Financial Assistance for Attendance at Private Elementary or Secondary Schools* (2009). The Report lists twenty-six such programs in fourteen states and the District of Columbia. Only five of these twenty-six programs - - those in Florida, Georgia, Iowa, Rhode Island and Pennsylvania - - use tax credit systems at all similar to the Arizona program. All but one of these five programs contain, as the Arizona program does not, provisions that prevent the award of scholarships on the basis of religion, that prevent the award of scholarships usable only at religious schools, that preserve parental free choice in the use of scholarships, and that ensure that the program serves a significant secular purpose.

Following are brief descriptions of the five programs in other states to which petitioners refer:

- The Florida Tax Credit Scholarship Program, Fla. Stat. Ann. § 220.187 (2009), provides scholarships for students who are in foster care, or for students with financial need who are not already attending private school. Florida employs three non-governmental STOs to award these scholarships. None is a religious organization. Florida's statute does not permit STOs to "restrict or reserve scholarships for use at a particular private school" and requires that STO scholarships allow a parent to transfer a scholarship during a school year "to any other eligible private school of the parent's choice." Although Florida has joined in an amicus brief supporting petitioners in this case, its program is clearly not called into question by the decision below, and the amicus brief does not suggest otherwise.

- Rhode Island's Business Entity Scholarship Tax Credit Program, R.I.Gen.Laws §§ 44-62-1; 44-62-2 (2009) provides scholarships only for students from low-income families. Only business entities may use the credits - - individual taxpayers may not. Taxpayers who take the tax credit may not designate funds for any student or any school. Rhode Island, like Florida, has three STOs, none of which is religiously affiliated. Rhode Island has not joined the amicus brief filed by eight states in support of the Petition in 09-991.

• The Iowa STO program, Iowa Code § 422.11S (2010), authorizes scholarships only for students from low-income families. Unlike Arizona taxpayers, Iowa taxpayers must contribute their own funds in order to be able to claim a credit. Iowa taxpayers also may not designate students as scholarship recipients and Iowa STO scholarships must allow students "to attend a qualified school of their parents' choice." Iowa has not joined the eight-state amicus brief.

• Pennsylvania's Educational Improvement Tax Credit Program, 24 Pa.Stat.Ann. 20-2001-B *et seq.*, awards scholarships only to students from low-income families. It includes grants for parental expenses in public as well as private-schools, and also includes direct grants to public schools for innovative educational programs. Pennsylvania has joined the amicus brief in support of the Petition in 09-991. That brief, however, does not explain how the Pennsylvania program would be endangered by the decision below.

• The only state program that closely resembles Arizona's in structure is a Georgia program adopted in 2008. Ga. Code, Ann. §§ 20-2A-1, 48-7-29.16 (2009). Data regarding the first year of the Georgia program's operation was not yet available when this brief was written. The Georgia statute, like Arizona's,

requires that STOs "allow students to attend any qualified school of their parents' choice." Georgia may, unlike Arizona, enforce this requirement. Georgia has not joined the eight-state amicus brief. Except for Pennsylvania, none of the states that have joined that brief has a school-choice program that could conceivably be jeopardized by the decision below.[5]

If the Arizona Legislature were interested in supporting non-public education through tax credits in a religiously neutral manner, nothing in the decision below would prevent it from doing so. Both Florida and Rhode Island have established religiously neutral

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[5] Petitioners also refer to a "cloud" over legislation that has been introduced in California, Montana, Nevada and Oregon. None of those proposals resembles Arizona's program and none would apparently contain the unconstitutional features of the Arizona program. With regard to the issues in the present case, the California proposal would require that scholarships be "portable during the school year and may be used at any qualified school that accepts the eligible student according to a parent's wishes," Assembly Bill 279, 2009-2010 Reg. Sess., § 3(d)(8), the Montana proposal would prohibit STOs from limiting scholarships to a "group of affiliated schools," S.B. 342, 61st Leg., Reg. Sess. §1(3)(c); the Nevada proposal would require STOs "to allow a child to attend a qualified school which is chosen by a parent or legal guardian of the child" and would prohibit STOs from designating the school at which a scholarship could be used, S.B. 289, 75th Leg., Reg. Sess., §§ 4(2), 6(1); and the Oregon program would credit "expenses actually paid or incurred during the tax year on behalf of an eligible student of whom the tax payer is a parent" and provide scholarships only for "low-income eligible students or eligible students with special needs." H.B. 2754, 75th Leg., Reg. Sess. § 3(2), (1)(g)(B) (Or. 2009). None of these proposals had been reported out of committee when this brief was written.

tax-credit programs that use non-religious school tuition organizations to award scholarships. That religiously-neutral option is available to Arizona. Intervenor Arizona School Choice Trust, for example, is a large, non-religiously affiliated STO that was instrumental in the initial enactment of the Arizona program and that awards scholarships without reference to religion. Arizona's insistence on continuing to use religious organizations to award scholarships that can only be used at religious schools supports respondents' contention that religious neutrality and full parental choice are not objectives of Arizona's program.

C. The Decision Below is Clearly Correct.

The opinion in *Zelman v. Simmons-Harris* summarized its reasons for decision in the following language:

> In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

536 U.S. 639, 662-663 (2002). It is clear that the

individuals "defined only by financial need and residence in a particular school district," to which this language refers - - the individuals who are entitled to "genuine choice" - - are the parents of children seeking vouchers, not taxpayers without children who are permitted to influence parental choice under the Arizona program. It is also clear that the *Zelman* Court believed that, to survive Establishment Clause scrutiny, the *Zelman* program had to be "entirely neutral with respect to religion," not only in theory, but in the way vouchers were actually awarded.

If respondents' allegations are true, the Arizona program fails to meet every one of the *Zelman* standards. In opposing certiorari, petitioners and their amici either misstate the way the Arizona program actually operates, misunderstand the meaning of the opinion below, or misperceive both of these things. Arizona's program is clearly not, for example, a program of private charity. It is a *state* program that uses *state* tax revenues to serve the *state*'s purported educational purposes. No private charitable contributions are involved. Nor is the decision below based on the fact that most Arizona program scholarships are used at religious schools. It is based on the allegations that the majority of Arizona's scholarships are *awarded* to parents on the basis of religion by the organizations that the state has empowered to grant the scholarships, that those awards *require* parents to send their children to religious schools, and that the Arizona program is not designed to serve, and does not in fact serve, its purported non-religious purposes.

Petitioners' basic contention appears to be that,

so long as the Arizona program is religiously neutral *on its face*, it passes constitutional muster, regardless of how it might lack religious neutrality in actual operation. If the court below had agreed with this argument, it would have committed error. Constitutional protections, including the Establishment Clause, are concerned not solely with facial neutrality. They are concerned with how government programs actually function. If respondents are given the opportunity to prove the truth of their factual allegations, they will show that the Arizona program functions in disregard of the Constitution's requirements that state-funded scholarships be awarded without reference to religion, and that parents - - not STOs and taxpayers - - have the right to choose where those scholarships will be used.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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MOTION

MOTION FILED

NOV 24 2010

Nos. 09-987, 09-991

In the Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF FOR THE PETITIONER

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MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF

Pursuant to S. Ct. Rule 21(b), Petitioner Arizona Christian School Tuition Organization respectfully moves for leave to file the accompanying post-argument brief. This brief is necessary because during oral argument in this case, the Justices posed several questions to either counsel for the United States, or counsel for the Arizona Department of Revenue, that Petitioner ACSTO, had it participated in oral argument, would have answered differently. Petitioner ACSTO believes the accompanying post-argument brief, which briefly sets out its view of the answers to these questions, would assist the Court in rendering a decision on the Article III standing and Establishment Clause merits issues involved in this appeal.

For the foregoing reasons, the motion for leave to file the accompanying post-argument brief should be granted.

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PETITIONER'S POST-ARGUMENT BRIEF

During oral argument in this case the Solicitor General of the United States and counsel for the Arizona Department of Revenue provided answers to several questions to which Petitioner Arizona Christian School Tuition Organization would have responded differently. Given the bearing of the matters inquired into on Plaintiffs' Article III standing and the constitutionality of Arizona's tuition tax credit program, Petitioner ACSTO briefly sets out below its responses to these questions.

First, Justices Kagan and Kennedy asked counsel for the United States whether the Court was without authority to decide *Walz v. Tax Commission*, 397 U.S. 664 (1970), *Committee For Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), *Hunt v. McNair*, 413 U.S. 734 (1973), *Mueller v. Allen*, 463 U.S. 388 (1983), and *Hibbs v. Winn*, 542 U.S. 88 (2004). Oral Argument Transcript (Tr.) 10-12. General Katyal answered that there would be "no taxpayer standing" in any of the above cases. Tr. 12.

Petitioner ACSTO agrees that the plaintiffs lacked taxpayer standing in *Mueller*, since there the plaintiffs brought a challenge in federal court to a tax deduction which did not extract any of their tax dollars to support religion, but rather gave a tax benefit to other taxpayers who made educational expenditures that qualified for the deduction. Under *Flast v. Cohen*, the taxpayer-plaintiffs lacked standing in *Mueller* because they were not complaining about the extraction and expenditure of

their tax dollars. 392 U.S. 83, 106 (1968) ("The taxpayer's allegation in such cases would be that *his tax money* is being extracted and spent") (emphasis added). The plaintiffs in *Mueller* therefore had not suffered the personal, direct, and concrete injury necessary to support Article III standing. Plaintiffs lack standing to challenge Arizona's tax credit for the same reason, *see* ACSTO Merits Br. at 15-20, among many others.

Of course, ACSTO also agrees with General Katyal that this Court could have disposed of the instant case in *Hibbs* on account of the Plaintiffs' lack of standing. As General Katyal correctly noted at oral argument, however, standing had not been raised or addressed at that point in the case. Tr. 12. Petitioner ACSTO, the party primarily responsible for asserting the standing defense throughout the case, was not granted intervention until after this Court's decision in *Hibbs*. The issue of Plaintiffs' Article III standing was simply not before the Court in *Hibbs*, and its failure to reach that issue is not precedent for the question of whether Plaintiffs have standing. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006) (noting that this Court "often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions -- even on jurisdictional issues -- are not binding in future cases that directly raise the questions") (internal quotation marks and citation omitted). Likewise, this Court's assumption of jurisdiction in *Mueller*, without deciding the jurisdictional issue, is not precedent for jurisdiction.

A ruling by this Court that taxpayer standing is absent here would not necessarily, however, require a holding that there was not Article III standing to decide the remaining cases listed by Justices Kagan and Kennedy. *Hunt* involved the state fisc directly: the plaintiffs challenged government revenue bonds issued to a religious college. Under the bond program, the college borrowed money from the State to finance a construction project, and the State owned title to the project until the college repaid the bonds in full. *Hunt*, 413 U.S. at 738 & 745 n.7. Further, the action was brought in state court by state taxpayers. *Walz*, also brought in state court, 397 U.S. at 666, involved municipal taxpayer standing, which this Court has held is not governed by the general bar against federal and state taxpayer suits. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006) (noting that the "'peculiar relation of the corporate taxpayer to the corporation' . . . distinguish[es] such a case from the general bar on taxpayer suits") (citation omitted). Finally, in *Nyquist*, the state provided direct money grants to nonpublic schools, and tuition assistance grants (in the form of tuition reimbursements and tax credits) to parents with children attending nonpublic schools. 413 U.S. at 762-63. Such matters squarely implicate the standing exception recognized in *Flast*. While one aspect of the funding in *Nyquist* involved tax credits, this Court has observed that the credits provided there were not based on the amount actually spent by the taxpayer, unlike the program here, and were therefore "thinly disguised 'tax benefits,' actually amounting to tuition grants." *Mueller*, 463 U.S. at 394.

Thus, Petitioner ACSTO's position is that standing was lacking in *Mueller*, as it is here, but not necessarily in the other cases mentioned at oral argument.

The second question that Petitioner ACSTO would have answered differently is whether anyone would have standing to challenge Arizona's tuition tax credit, a question posed by Justice Ginsburg. Tr. 8. General Katyal stated that the United States' "answer is no," and that denying standing here "accords with this Court's general reluctance to confer taxpayer standing in this area." *Id.*

While ACSTO concurs that taxpayers like the Plaintiffs—who are suing based solely on their status as taxpayers and whose money is not being extracted and spent to support religion—lack standing to challenge this program, it does not follow that no one would have standing to challenge this program. The Establishment Clause would not be "unenforceable" without taxpayer standing here. *Id.* For example, a secular school tuition organization would have Article III standing to challenge the Arizona Department of Revenue over a denial of its ability to participate on equal terms in the tax credit program. Also, a taxpayer who donated to a secular STO yet was denied a credit would have Article III standing to challenge the denial. Further, taxpayers can (and did, *see Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999)), challenge this program in state court where Article III's limits do not apply. In sum, plaintiffs who actually suffered a cognizable injury, not based solely upon their status as taxpayers,

could challenge this program in federal court and, even as taxpayers, could sue in state court.

The third question involved Justice Kennedy's hypothetical regarding an STO that discriminates based on race, and whether such discrimination would violate the federal constitution. Tr. 19. There are several important responses to this question.

First, the tax credit statute itself bars race discrimination by STOs. State App. 4.

Second, and importantly, there is no evidence in the record that STOs engage in any form of discrimination toward students or their families, including religious discrimination. STOs simply affiliate with like-minded schools (be they secular, religious, or those catering to American Indians, the homeless, special needs, etc.), and provide scholarships to students who desire to attend those schools, regardless of their religious beliefs. No STO awards scholarships based on the religion of the applicant. In fact, parents choose which school their child will attend, then apply for a scholarship. Not a dime can be sent by any STO to any school without a parent first choosing that school and applying for a scholarship. Respondents conceded that they have no qualms with the private schools themselves (Tr. at 29, ll. 16-17), and before private schools make enrollment decisions, taxpayers, STOs, and parents exercise their private choices.

Third, if race discrimination was not barred by the statute and an STO actually engaged in such

discrimination, the Internal Revenue Service could deny the STO 501(c)(3) status, pursuant to *Bob Jones University v. U.S.*, 461 U.S. 574 (1983). The organization would then no longer qualify as an STO, since the tax credit statute requires that such organizations have 501(c)(3) status. State App. 9.

Finally, the 501(c)(3) STOs are not state actors simply because they are regulated by the State. Arizona's regulations and financial reporting requirements for STOs are no different, and are even less onerous, than the regulations imposed on 501(c)(3) corporations by the federal government, other states, and Arizona. ACSTO Supp. Br. 4-9. Such regulations do not convert 501(c)(3) corporations into state actors. In fact, far less onerous government regulations are imposed on 501(c)(3) corporations than on financial and insurance institutions, just to name a few. These institutions do not become state actors, despite their extremely heavy regulation by federal and state governments, and neither do the far less regulated 501(c)(3) corporations at issue here.

Respectfully submitted,

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November 24, 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 24 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-988, 09-991

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, *et al.*,
Petitioners,

ARIZONA SCHOOL CHOICE TRUST, *et al.*,
Petitioners,

GALE GARRIOTT, in his official capacity as
Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* JEWISH TUITION ORGANIZATION AND NEW WAY LEARNING ACADEMY IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Jewish Tuition Organization ("JTO") and New Way Learning Academy reflect the diversity of educational opportunities for children advanced by Arizona's private school tuition organization ("STO") tax credit, Ariz. Rev. Stat. Ann. § 43-1089 (West Supp. 2009), and endangered by the Ninth Circuit panel's opinion attacking that credit under the Establishment Clause.

The JTO is a 501(c)(3) Arizona non-profit corporation formed in 1999 to support Jewish day school education in the Phoenix metropolitan area. The JTO was organized by concerned members of the Jewish community, and its board consists of directors appointed by each of the participating day schools and a chair appointed by the Jewish Federation of Greater Phoenix.[2] Measured by contributions in 2008, the last year for which the Arizona Department of Revenue has published data, the JTO is the sixth-largest STO in Arizona. In

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the clerk, and counsel of record gave each party's attorney at least ten days' notice of the intent to file this brief.

[2] The JTO's participating schools currently include the East Valley Jewish Day School, the Jess Schwartz Jewish Community Day School, Pardes Jewish Day School, the Phoenix Hebrew Academy, Shalom Montessori, and Shearim Torah High School.

2008 it made need-based scholarship grants of nearly $2.2 million to approximately 390 students. The JTO's average grant in 2008 was $5,585, among the highest in the state.[3]

While some contributors to the JTO do not take the STO tax credit, most of the contributions are made by individuals who intend to take advantage of it, and the JTO solicits contributions on the basis of the tax credit. Without the JTO's tax credit-financed scholarships, hundreds of children each year would be unable to afford to continue in their schools.

New Way Learning Academy is Arizona's only non-profit, private K-12 school specializing in educating children with learning differences, including dyslexia, AD/HD, and other issues. Founded in 1968, the Scottsdale school, which has no religious affiliation, is approved by the Arizona Department of Special Education to serve students with learning disabilities, and its faculty includes certified special education teachers and reading specialists, a speech-language pathologist, an occupational therapist, and certified academic language therapists. New Way offers a student/staff ratio of 6:1 and develops individualized education plans carefully crafted around the student's educational needs and abilities as identified through

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[3] *See* Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, apps. I-II (2009) [hereinafter *ADOR 2008 Reporting*], *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2008.pdf (last visited Mar. 15, 2010).

comprehensive assessments of speech/language skills, motor skills, and more.

New Way participates in New Valley Education Partners, an STO that grants scholarships to students who attend three non-religious Arizona schools: New Way, Tesseract School, and Verde Valley School. The cost of such specialized education is significant, and in 2008 twenty New Way students received need-based scholarships totaling over $204,000. *ADOR 2008 Reporting*, *supra* note 3, app. IV. The STO tax credit is crucial to New Way's ability to continue to provide unique educational opportunities for its students.

SUMMARY OF ARGUMENT

The Ninth Circuit panel's opinion misapplies this Court's precedent in reinstating Respondents' Establishment Clause challenge to Arizona's thirteen-year-old STO tax credit. Contrary to the panel's opinion, Arizona STOs *enhance* the constitutionality of the tax credit by adding three more layers of *private* choice on top of the parents' own decision about where to educate their children. First, private citizens—including parents—create the STOs. Second, the private STOs then decide whether to provide scholarships at all private schools in Arizona or a subset of such schools. In doing so, many STOs adopt a wide variety of limiting principles for schools or scholarships: geography, special needs, culture, extreme financial need, pedagogical philosophy, shared non-sectarian school characteristics, self-selected school groupings, and, lastly, religious instruction. If existing STOs do not adequately serve the interests of particular groups of parents or schools,

then those groups can and do create new STOs to meet their needs.

Third, each STO must convince each taxpayer each year not only to take advantage of the tax credit, but also to contribute to that particular STO. Taxpayers considering whether to make a contribution face the burden of the float between the contribution in one year and the tax credit in the next. That float may be a high or even insuperable barrier to participation at any level, and the tax credit therefore operates in practice much like a tax deduction. The limiting principles on which some STOs operate, whether non-sectarian or sectarian, are critical to their efforts to persuade taxpayers that the causes and interests they represent—the students and schools they aid—are worthy of support.

This market of families, schools, taxpayers, and STOs consists entirely of private actors exercising private choices. When it comes to whether the children and the scholarship dollars will end up at religious or non-religious schools, the state is entirely neutral. Arizona has sought to enhance the quality of education by promoting competition among public and private schools of *all* kinds, not to establish religion.

The Court should grant certiorari at this time, rather than allowing further delay as this case, which is already ten years old, winds its way through the district court and court of appeals a third time, leaving thousands of children at immediate risk. Despite the technically interim procedural posture of the Ninth Circuit's decision, the facts concerning where the scholarship funds ultimately go are not in dispute, and there is no

additional evidence of legislative intent to be gleaned. The court of appeals' remand to the district court will be an empty exercise, and the doctrine of law of the case will likely control any future appeal from final judgment. Thus, the case will find its way back to this Court unchanged. In the meantime, the panel's opinion will cast a pall on STOs' ability to solicit contributions needed to fund scholarships for tens of thousands of elementary- and secondary-school students in Arizona private schools. This threat to the continuity of the education of children whose families have relied on STO-funded grants for as long as a decade, as well as to the viability of many private schools, makes the issues presented of urgent and compelling public importance.

ARGUMENT

Petitioners have explained in their respective petitions how the panel's opinion conflicts with this Court's decisions in *Mueller v. Allen*, 463 U.S. 388 (1983), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), as well as Arizona state court decisions upholding both the individual STO tax credit at issue here, *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 810, 921 (1999), and Arizona's more recently enacted corporate STO tax credit, *Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App.), *review denied* (Ariz. Oct. 27, 2009).[4] Instead of repeating that analysis, the JTO

[4] In 2006 the Arizona legislature enacted a tax credit for corporate contributions to STOs that fund scholarships for students whose family income does not exceed 185 percent of the income limit for federal reduced-price lunch programs, and who transfer from public to private school. Ariz. Rev. Stat. Ann.

(Cont'd)

and New Way address how the Ninth Circuit panel's opinion misapprehends the tax credit's operation, finding a perceived government imprimatur on religious education in a scholarship system that operates completely as a matter of multi-tiered *private* choice in a competitive market of parents, contributors, private schools, and privately formed and operated STOs.

I. THE STO TAX CREDIT PROGRAM PROVIDES ADDITIONAL LEVELS OF PRIVATE CHOICE THAT INSULATE THE TAX CREDIT FROM ESTABLISHMENT CLAUSE CONCERNS.

A. STOs Enhance the Private Nature of Scholarship Grants.

The Ninth Circuit panel misplaced reliance on Respondents' allegation that most STO funds are available only for education at religious schools, thereby restricting parents' choice. This, the panel speculated, "could reveal the legislature's stated purpose in enacting Section 1089 to be a pretense." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1012 (9th Cir. 2009) [hereinafter Panel Opinion]. Based on the range of parental choice alone, the panel compared the tax credit's operation unfavorably to the educational-expense deduction and direct voucher program at issue in *Mueller* and *Zelman*. *See id.* at 1015-16 & n.13; *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 656

(Cont'd)

§ 43-1183(K) (West Supp. 2009). In addition to this credit, which was upheld in *Green*, in 2009 the Arizona legislature created a separate corporate tax credit for contributions to STOs that fund scholarships for children with disabilities or in foster care. Ariz. Rev. Stat. Ann. § 43-1184(Q)(3) (West Supp. 2009).

(9th Cir. 2009) (D.W. Nelson, Reinhardt, Fisher, JJ., concurring in denial of rehearing en banc) [hereinafter Panel Concurrence]. But in those cases, parental choice was particularly significant because it was the *only* operative avenue of private choice that channeled the government benefits.

In contrast, Arizona has further insulated educational choices from government involvement by structuring a program with multiple levels of private actors. In upholding the corporate STO tax credit, the Arizona Court of Appeals recognized that "[t]here are two distinct levels of private choice that 'direct the aid to religious schools or institutions of their choosing,": "the taxpayer" and "the scholarship recipient and his or her parents." *Green*, 212 P.3d at 102 (quoting *Zelman*, 536 U.S. at 649). In fact, there is also a third level of private choice: the STOs themselves.[5]

The creation and operation of the STOs reflect and interact with the choices of parents, schools, and contributors, who collectively express through a competitive marketplace what types of STOs exist and which schools they may from time to time support by making grants to matriculating students. The government is not involved at all in deciding which students will receive grants, much less which schools

[5] "Multiple layers of private, individual choice separate the state from any religious entanglement," and the government "is at least four times removed from any aid to religious organizations": "Individuals choose to create an STO. STOs choose to limit their funds to certain schools. Taxpayers choose to donate. Parents choose to apply for scholarships." 586 F.3d 658, 662, 670 (O'Scannlain, J., joined by Kozinski, CJ., Kleinfield, Gould, Tallman, Bybee, Bea, and N.R. Smith, JJ., dissenting from denial of rehearing en banc) [hereinafter En Banc Dissent].

they will attend. The government never even receives individualized reporting of grants, but only aggregate data for the STOs and schools. *See* Ariz. Rev. Stat. Ann. § 43-1089(F)(1)-(6) (West Supp. 2009).

Each of these tiers of private actors has equal constitutional significance in distancing the government from any perception of impermissible involvement in religious education, even if the different private actors may at times be perceived to act at cross-purposes by restricting one another's choices. As this Court noted in *Zelman*, "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." 536 U.S. at 654-55. The Court did not suggest, as the panel asserted, that the "private individuals" who make the "private choice" must be parents. *Cf.* Panel Opinion, 562 F.3d at 1016, 1017 n.14. Consequently, if the vouchers to parents at issue in *Zelman* were constitutional because one level of private actors (parents) determined that the money would end up largely at religious schools, then *a fortiori* the same must be true of a system that involves multiple levels of private actors (parents, taxpayers, and STOs) who collectively make that determination. As eight Ninth Circuit judges poignantly asked below in dissenting from the denial of rehearing en banc, "How can *increasing* the separation between state and religion result in heightened government endorsement?" En Banc Dissent, 586 F.3d at 662.

The panel attempted to blur the distinction between these private actors and the state by using passive terminology[6] or by attributing the result to "how the Arizona Department of Revenue applies the statute." Panel Concurrence, 586 F.3d at 650, 651. But the state has "applied the statute" by maximizing private choice in the marketplace of educational ideas. To the extent that there are "incentives for parents to send their children to religious schools," *id.* at 653, they are not of the state's making.

B. STOs Operate as Private Actors in a Competitive Marketplace for Contributors.

In law and in practice, the government does not fund STOs; private contributors do. The government does not make grants or disburse public money to STOs; it does not select the winners or losers. *See Kotterman*, 972 P.2d at 618 (holding that "no money *ever* enters the state's control as a result of this tax credit" and, "under any common understanding of the words, we are not here dealing with 'public money'"). Rather, the state's tax credit allows contributors to keep more of their own money, regardless of the means by which the tax consequences are calculated. As the Arizona Supreme Court noted, "It is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the

---

[6] *E.g.*, Panel Concurrence, 586 F.3d at 650 ("Under the Arizona program . . ."); *id.* at 653 ("by allowing tax credits for contributions to discriminatory STOs"); *id.* at 658 (similar).

government, and upon which the state has a legal claim." *Id.*

The Ninth Circuit panel's fundamental mistake lay in viewing the STO tax credit as the functional equivalent of direct grants by the state to religious schools or even religiously oriented STOs, as if they, rather than the taxpayers, received the tax credit. *See* Panel Opinion, 562 F.3d at 1009-10. Its analysis hinged on drawing a hard-and-fast line between above-the-line tax deductions and below-the-line tax credits. *See id.* at 1008-10. In reality, with respect to both timing and government involvement in the disbursement of scholarship funds, the STO tax credit functions in the same manner, and subject to the same private market forces, as a tax deduction. *See Kotterman*, 972 P.2d at 612 (concluding that despite "mechanical differences," the distinctions between deductions and credits are not "constitutionally significant").

As with a tax-deductible contribution, those who wish to take advantage of the tax credit pay their money directly to the STO of their choice. To claim the credit, taxpayers must make their contributions by December 31. Only when they later file their tax returns—i.e., by April 15 or thereafter under an extension—may the taxpayers seek a credit by submitting Arizona Form 323. The state does not provide a check-off box for contributions on the tax return, allowing taxpayers to send their taxes to enumerated STOs rather than to the government. Instead, even if the taxpayers ultimately receive a full credit, they will have incurred

the cost of the months of float between when they make their contribution in the tax year and when they either pay reduced taxes with their return or, even later, receive a refund in the following year. The only ultimate difference between this credit and a deduction is the share of the actual contribution the taxpayer ultimately sees returned in lower taxes.

In light of, among other things, taxpayers' inertia, their philosophical preference for public school education, and the cost of the months of float between contribution and credit, STOs have to market the tax credit to convince taxpayers to exercise their private choice. This includes explaining how the tax credit operates and convincing taxpayers that private schools merit support. Moreover, in the same year that Arizona adopted the STO tax credit, it also adopted tax credits for contributions to public school extracurricular activities and character education programs, Ariz. Rev. Stat. Ann. § 43-1089.01 (West Supp. 2009), and to charitable organizations that help the working poor, Ariz. Rev. Stat. Ann. § 43-1088 (West Supp. 2009). While taxpayers may take each of these tax credits, financial constraints often put the STOs, public schools, and other organizations in effective competition for contributors, particularly as the calendar year comes to a close.

For these reasons, STOs commonly rely on a variety of marketing tools, including personal solicitations by volunteers or paid marketers; public speeches; tables at events; newspaper, magazine, theater-screen, and broadcast advertising; telephone banks; and pamphlets, fliers, mass mailings, and e-mail blasts. As with any system that relies on private choice, marketing is not

an easy task. It is particularly difficult in times of economic trouble, when the float proves for many or even most taxpayers to be an insuperable obstacle to contribution, even though the taxpayer's state income tax liability exceeds the maximum contribution and the taxpayer will eventually receive a dollar-for-dollar tax credit.[7] For this reason, the JTO saw its total contributions drop for the first time in 2008, and many other STOs experienced a similar economy-driven decline in revenues. *See ADOR 2008 Reporting*, *supra* note 3, app. I.

In addition to convincing taxpayers that private school education is a worthy cause in the abstract, each STO must convince contributors that it among all other STOs deserves support. Like all private choices, support for a particular STO and its professed mission can be fickle. Taxpayers frequently change from year to year whether they contribute to any STO, as well as which STO or STOs they will support. For example, approximately one fifth of the JTO's contributor pool turns over every year. Many taxpayers may split their contributions between different STOs in a single year, based on how the taxpayer values the choices made by the STO. "[N]othing in Section 1089 precludes any Arizona taxpayer, tomorrow, from suddenly deciding to fund exclusively secular STOs." En Banc Dissent, 586 F3d at 664 n.12. In this ongoing struggle for taxpayer support, the state simply plays no role.

[7] Thus, as a practical matter the panel erred in suggesting that "[a] tax-credit eligible contribution to an STO costs the taxpayer nothing." Panel Concurrence, 586 F3d at 650 n.2.

C. STOs Freely Choose Whether to Adopt Limiting Principles.

The STO tax credit in operation fulfills the secular purpose of "equalizing opportunities for Arizona's children" by, as its primary legislative sponsor explained, providing "an encouragement and incentive for citizens to donate to an organization they believe in."[8] Because citizens believe in different things, STOs do not come in one flavor, and the variety of STOs is not the result of government preference, but the fruit of private choice cross-pollinated among families, schools, and communities. STOs are created from time to time by private actors, free of government influence, to further the beliefs, priorities, and interests of a variety of other private actors, including parents, schools, and taxpayers themselves. Indeed, STOs have dramatically expanded in number: In 1999, the year before this litigation began, there were seventeen STOs in operation; in 2000 there were thirty; and today there are fifty-five. *ADOR 2008 Reporting*, *supra* note 3, at 3. As the dissent below accurately noted, "Anyone can form an STO, and there are no constraints on a taxpayer's ability to donate to an STO of his choice." En Banc Dissent, 586 F.3d at 659. In particular, parents "can create their own STO and solicit donations for use at secular private schools." *Id.* at 666. The formation of both the JTO and New Valley Education Partners illustrates these points.

[8] Minutes of Mtg., H.R. Comm. on Educ., H.B. 2074, 43rd Leg., 1st Reg. Sess. 1 (Ariz. Jan. 29, 1997) (statement of Rep. Mark Anderson), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/43leg/1R/comm_min/House/0129%2EED.htm (last visit-ed Mar. 18, 2010).

To the extent that some (but not all) STOs may limit the qualifying schools at which their scholarships may be used, that is in part because many STOs are created by the schools themselves for the benefit of the families who wish to send their children there. As a result, the diversity and size of STOs reflect the diversity and size of the school communities they support. The JTO, for example, was born in discussions among representatives of three Jewish schools about the need for a common fund that would avoid competition for contributors, and the idea was later supported by a broader community organization, the Jewish Federation of Greater Phoenix. In contrast, New Valley Education Partners, in which New Way participates, reflects the cooperation of three diverse non-religious schools that do not share common signature characteristics other than a commitment to quality education.

It is up to the STO itself how to define the students and schools it will directly or indirectly support. Some STOs support *all* children and *all* schools. Other STOs distinguish among children based only on whether the families demonstrate the level of financial need that the STO requires. (Petitioner Arizona School Choice Trust is of the latter type.) Many STOs thus support a broad range of schools that includes religious and non-religious institutions.[9]

[9] Such STOs also include the Arizona Scholarship Fund (Arizona's third largest STO), https://www.azscholarships.org/index.aspx?c=73 (last visited Mar. 15, 2010); the Arizona Private Education Scholarship Fund, Inc., http://apesf.org/supported_schools (last visited Mar. 15, 2010); the Institute for Better Education, https://www.ibescholarships.org/index.aspx?c=80 (Cont'd)

In contrast, other STOs have chosen one or more distinctive limiting principles that may be religious or non-religious in nature. These limiting principles reflect private choices about what kinds of children to help, or what kind of schools or education to foster:

- **Geography:** An STO may focus geographically, soliciting contributors and supporting private schools in a particular area.[10]

- **Special Needs:** As in New Way's case, an STO, reflecting a school it supports, may focus on grants to children with special educational needs.

- **Culture:** An STO may focus on aiding students on a cultural basis rather than religious grounds.[11]

(Cont'd)

(last visited Mar. 15, 2010); and the Tuition Organization for Private Schools, https://www.topsforkids. com/index.aspx?c=60 (last visited Mar. 15, 2010).

[10] One example is the School Tuition Association of Yuma, Inc. *See* http://www.azstay.org (last visited Mar. 15, 2010).

[11] For example, Arizona Native Scholastic Enrichment and Resources provides for the educational needs of Arizona Native American youth and their tribes, and its "strategy is to prepare American Indian students for success in college by placing them in private high schools." http://ag.arizona.edu/pubs/general/azlp47-2/other_resources.html (last visited Mar. 15, 2010).

- **Extreme Need:** An STO may focus on families in the direst financial straits, such as the homeless.[12]

- **Pedagogy:** An STO may support schools that use a particular non-religious pedagogical approach, such as the Montessori method or Waldorf education.[13]

- **Shared School Characteristics:** An STO may support groups of schools based on shared non-religious characteristics, such as membership in a national school organization.[14]

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[12] The Maricopa County Schoolhouse Foundation provides scholarships for the children of homeless parents and other economically disadvantaged families. *See* http://www.mcschoolhousefoundation.org/pdf/tuitionTaxCreditForm2006.pdf (last visited Mar. 15, 2010).

[13] Examples include the Montessori Centre School Tuition Organization, http://www.montessorictr.org/Newsletters/Main/Newsletter%20September%202009.pdf (last visited Mar. 15, 2010); the Montessori Scholarship Organization, http://www.mkIthejungle.org/mso-tax-credits.html (last visited Mar. 15, 2010); and the Arizona Waldorf Scholarship Foundation, http://www.tucsonwaldorf.org/Development_Tax_Credit.html (last visited Mar. 17, 2010).

[14] For example, the Arizona Independent Schools Scholarship Foundation supports need-based scholarships to three non-religious Arizona schools that are members of the National Association of Independent Schools: Phoenix Country Day School, Green Fields Country Day School, and St. Gregory College Preparatory School. *See* http://www.aissf.org/aboutus.php (last visited Mar. 15, 2010).

- **School Groupings:** An STO may reflect the coordinated efforts of the self-selected group of schools that created it.[15]

- **Religious Instruction:** Finally, an STO may support schools that offer religious education, whether they reflect a particular movement or denomination or a broad range of beliefs.

The JTO, for example, chooses to support scholarships at Jewish day schools for families with financial need, and its staff and volunteer accountants work diligently to evaluate the financial need of applicants and make scholarship grants. Over more than a decade of operation, it has added additional or new participating day schools in response to parent or community requests.

In any event, as the dissent below observed, the majority of STOs—thirty out of fifty-five—do not limit their scholarships to students willing to attend religious schools. En Banc Dissent, 586 F.3d at 660 & n.6. Indeed, five of the ten largest STOs, including the third and fourth largest, have no religious affiliation. ADOR 2008 Reporting, *supra* note 3, app. I.

These limiting principles help motivate private parties to contribute to the STOs. In light of the

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[15] For example, the Orme Primavera Schools Foundation provides scholarships to the Primavera School in Prescott and the Orme School in Mayer, both non-religious schools. *See* http://www.ormeprimavera schoolsfoundation.org (last visited Mar. 15, 2010).

inconvenience or hardship of the float, many or even most taxpayers may not be sufficiently moved by the idea of private-school education generally to support an all-children, all-schools approach. They are generally more inclined to give to STOs if they know their money will help children with particular financial or educational needs, or local schools, or their children's or friends' schools, or their own alma mater, or particular educational methods, or religious teaching.

But in every respect and at every level, those are purely private choices, not government policy. The government does not encourage STOs to adopt *any* limiting principles, much less religious ones, and it does not encourage taxpayers to contribute to a particular kind of STO. In making their philosophical and educational judgments, STOs operate in the same manner as private scholarship organizations that are funded solely by tax-deductible charitable contributions. They certainly exercise no governmental authority that could be analogized, as the panel did, to the state's delegation of the authority to veto liquor license applications in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). *See* Panel Opinion, 562 F.3d at 1020-21.

No reasonable observer would perceive any government favoritism toward a particular choice. As with tax-deductible contributions, the State of Arizona provides the playing field and makes neutral rules, but it then sits on the sidelines and does not root for any team. There is no sense in which, "from the perspective of the program's aid recipients, [the tax credit] 'deliberately skew[s] incentives toward religious schools.'" Panel Opinion, 562 F.3d at 1013 (quoting

Zelman, 536 U.S. at 650). The dissent below thus accurately noted that "the state's involvement stops with authorizing the creation of STOs and making tax credits available. After that, the government takes its hands off the wheel." En Banc Dissent, 586 F.3d at 660. "That is not government endorsement: that is government nonchalance." *Id.* at 662.

D. Scholarship Funds Flow to Religious Schools Only Because They Follow Parents' Demand.

The Ninth Circuit panel's reliance on how the scholarships ultimately are awarded from year to year is both legally erroneous and factually misguided. As a legal matter, this Court has at least twice rejected rules that would evaluate facially neutral laws under the Establishment Clause based on who benefits from time to time, which is necessarily a moving target. *See Zelman*, 536 U.S. at 657 ("attribut[ing] constitutional significance" to a high percentage of participating religious schools "would lead to the absurd result that a neutral school-choice program might be permissible" in some areas or states but not others); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

As a factual matter, money tends to end up in private religious schools because they outnumber private non-religious schools. That is hardly surprising, because the State of Arizona has dramatically enhanced the variety of non-religious options available in *public*

schools. *See Zelman*, 536 U.S. at 655-56 (holding that Establishment Clause question "must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school").

For example, in 1994—three years before the STO tax credit was enacted—the Arizona legislature authorized charter schools to "provide additional academic choices for parents and pupils" and "serve as alternatives to traditional public schools." Ariz. Rev. Stat. Ann. § 15-181(A) (West 2009). Such public schools operate independently of the local school district and reflect a variety of educational philosophies.[16] There are charter schools that focus on "great books" (the Great Hearts Academies), other educational methods (the Montessori Charter School of Flagstaff), the arts (the Arizona School for the Arts), the sciences (the Academy of Math and Science), and a variety of other needs and target communities. Of the more than 4,000 charter schools in the United States, 502 are in Arizona; they represent a quarter of all public schools in the state, and enroll over 101,000 students—ten percent of Arizona's public school population.[17]

In addition, in 1995 the Arizona legislature mandated an "open enrollment policy" in public schools

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[16] *See* Arizona Department of Education, *Charter School Search*, http://www.ade.state.az.us/charterschools/ (last visited Mar. 15, 2010) (list of charter schools).

[17] *See* Arizona Charter Schools Association, *About Arizona Charter Schools*, http://www.azcharters.org/pages/schools-basic-statistics (last visited Mar. 15, 2010).

in order to expand parental choice. *See* Ariz. Rev. Stat. Ann. § 15-816.01(A) (West Supp. 2009). As an example of the choices now available, some public school districts themselves offer "traditional academies" that use different curricula and instructional methods.[18]

This range of options is critical in at least two ways. First, there is no evidence for the panel's suggestion that the Arizona legislature attempted through the STO tax credit to advance religion. *See, e.g.*, Panel Concurrence, 586 F.3d at 657-58. Rather, Arizona has sought to advance the secular goal of improving the quality of education by expanding educational options of *all* kinds. It has promoted competition among public schools (whether district or charter), among private schools, and between public and private schools. The Arizona Constitution's Aid Clause, however, prohibits direct government aid to *any* private schools, whether or not religious. *See* Ariz. Const. art. IX, § 10; *Cain v. Horne*, 202 P.3d 1178, 1182-84 (Ariz. 2009) (invalidating voucher program because "[t]he Aid Clause prohibits the use of public funds . . . to aid *private* or sectarian schools"). The Arizona Supreme Court held in *Kotterman* that the Aid Clause did not prohibit tax credits for private contributions. 972 P.2d at 617-21. The tax credit program therefore was necessary to support private educational options of any and all kinds, and Arizona has now enacted several credits for that purpose. *See supra* note 4.

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[18] *See, e.g.*, Chandler Traditional Academy, http://www.mychandlerschools.org/200920981408243/blank/browse.asp?A=383&BMDRN=2000&BCOB=0&C=68508 (last visited Mar. 15, 2010).

Second, given the opportunities to attend innovative publicly funded district or charter schools on a tuition-free basis, or even to start a charter school rather than a private school,[19] it is to be expected that most students or educational innovators interested in non-religious education will end up in public schools. *See* Erica Schacter Schwartz, *Why Pay for Religious Schools When Charters Are Free?*, Wall St. J., June 12, 2009, at W13 ("This mix of charter and after-school tutorial is the model that presents a real challenge to private, religiously focused day schools.").

It is also to be expected that private schools will tend to be those that offer what public schools cannot. In some cases, private schools may provide non-religious education of a specialized kind; *amicus* New Way, for example, focuses on serving students with learning differences. In other cases, private schools may provide religious education. *See Zelman*, 536 U.S. at 656-57 ("Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities."). Thus, roughly three-quarters of Arizona's private schools are religious[20] and, consistent with that fact, Respondents alleged below that "75% of the scholarship funds granted by STOs in 1998 were granted to students attending religious schools, and 79% of the

[19] *See* Arizona Charter Schools Association, *Start Your Charter School*, http://www.azcharters.org/CharterStarter (last visited Mar. 15, 2010).

[20] *See Kotterman*, 972 P2d at 626 (Feldman, J., dissenting) ("At least seventy-two percent of [Arizona nongovernmental] schools are sectarian.").

schools receiving scholarships were religious schools." 9th Cir. Excerpts of Record 4. STO funds have thus followed the students and the schools as a matter of private choice, not government policy. The results of private choices do not provide grounds for invalidating the tax credit under the Establishment Clause.

The panel argued that "taxpayers, rather than parents, direct funds to religious organizations" and thereby limit parents' choices to send their children to non-sectarian schools, Panel Concurrence, 586 F.3d at 650, 652, but this assertion fails to appreciate the role of parents in determining which STOs receive money in the first place. Parents are critical to starting many STOs, convincing STOs to add schools to approved lists, and directing contributions to STOs that support the schools of their choice. They do this not only by contributing themselves to STOs, but also by convincing family members, friends, neighbors, and co-workers to contribute. They also man the STOs' marketing efforts: working tables at events, passing out fliers, staffing phone banks.

In the end, many STOs give all or sizeable portions of their scholarship funds to students at religious schools because the families *prefer* to send their children to those schools, and help direct taxpayer contributions to STOs that can fund those preferences. Parents are not the passive victims of others' choices—much less the choices of any state actors—but rather are the engine of choice by the students, the schools, the STOs, and the taxpayers.

II. IT IS URGENT THAT THE COURT GRANT CERTIORARI NOW.

This Court should grant certiorari and review the Ninth Circuit panel's opinion at this juncture, as any delay will put at risk the education of thousands of children throughout Arizona. For over a decade, parents and schools have relied on tax credit-funded scholarships awarded by STOs, and over 28,000 students currently receive scholarships. They have done so with the security of knowing that the STO tax credits have been consistently upheld by Arizona and federal courts since the *Kotterman* decision in 1999. Many of the children have attended their current schools for their entire academic lives, and they have no effective alternatives for staying in those schools. Most STOs rely almost exclusively on contributions by taxpayers who anticipate taking the tax credit. Without the tax credit, many schools will wither and some will die, and even if the schools survive many children will be unable to afford them.

Though the Ninth Circuit panel's decision is by nature interim, it casts a pall over the tax credit and the scholarships it funds. Many taxpayers already accept the burden of the float, and they will be asked also to accept an unwarranted risk that the panel's opinion will retroactively impose higher tax liabilities (unless the STOs agree to return contributions that likely have already been paid out in grants). Unless this Court grants certiorari now, the natural result of the Ninth Circuit panel's opinion will be to depress the level of contributions this year and for years after, even if the tax credit is ultimately upheld.

Moreover, as the dissent noted, despite "the procedural posture of this decision" and the remand to the district court, "no one disputes plaintiffs' factual allegations about how the program operates in practice," and the remand will be "little more than an empty formality." En Banc Dissent, 586 F.3d at 661 n.7. A future Ninth Circuit panel likely will consider itself bound by the law of the case, leaving only this Court to correct the current panel's error on a new set of petitions for certiorari, with nothing changed. To avoid this, the Court should review these issues now.

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
JUL 30 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

In the Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Docket Entries

United States District Court for the
District of Arizona
No. 2:00-cv-00287-EHC

Date Filed	#	Docket Text
02/15/2000	1	COMPLAINT FILED (LSP) (Entered: 02/22/2000)
		* * *
03/09/2000	3	MOTION to dismiss for lack of subject matter jurisdiction by dft Mark W Killian [3-1] (former emp) (Entered: 03/10/2000)
		* * *
04/11/2000	14	RESPONSE by plas to motion to dismiss for lack of subject matter jurisdiction by dft Mark W Killian [3-1] (former emp) (Entered: 04/12/2000)
		* * *
04/20/2000	22	REPLY by dft Mark W Killian to response to motion to dismiss case for failure to state a claim by intervenor Lisa Graham Keegan [6-1] (former emp) (Entered: 04/24/2000)
04/20/2000	23	MOTION to intervene as a dft by Arizona Christian [23-1] (LODGED: Mtn to Dismiss and Memo of Points and Authorities in Support of Mtn to Dismiss at deputy clerk's desk.). (former emp) Modified on 04/24/2000

(Entered: 04/24/2000)

* * *

02/27/2001	36	ORDER by Judge Earl H. Carroll granting motion to dismiss for lack of subject matter jurisdiction by dft Mark W Killian [3-1]. All other pending mtns are denied as moot. terminating case (cc: all counsel) (former emp) (Entered: 02/27/2001)
02/27/2001	37	JUDGMENT: The Crt has granted dft's mtn to dismiss for lack of subj matter jurisdiction; therefore, plas take nothing and their complaint and action are hereby dismissed. (cc: all counsel) (former emp) (Entered: 02/27/2001)
03/27/2001	38	NOTICE OF APPEAL by all plas from District Court judgment [37-1], and order [36-2] (cc: 9CCA/All Counsel/EHC) (REW) Modified on 08/23/2004 (Entered: 05/02/2001)

* * *

06/16/2003	47	MOTION (Unopposed) to Intervene as Defendants by Arizona School Choice Trust [47-1] (SAT) (Entered: 06/18/2003)
06/16/2003	48	MEMORANDUM IN SUPPORT by movant Arizona School Choic of Motion (Unopposed) to

		Intervene as Defendants by Arizona School Choice Trust [47-1] (SAT) (Entered: 06/18/2003)
		* * *
07/08/2003	51	ORDER by Judge Earl H. Carroll that Arizona School Choice Trust's Unopposed Motion to Intervene as Defendants [47-1] is GRANTED; Arizona School Choice Trust, Glenn Dennard and Luis Moscoso are hereby added as named defendants in this action (cc: all counsel) re: order filed [51-1] (SAT) (Entered: 07/08/2003)
07/08/2003	52	MOTION to Dismiss case by dft Arizona School Choic, dft Glenn Dennard, dft Luis Moscoso [52-1] (SAT) (Entered: 07/08/2003)
07/08/2003	53	MEMORANDUM of Points and Authorities IN SUPPORT by dft Arizona School Choic, dft Glenn Dennard, dft Luis Moscoso of Motion to Dismiss case by dft Arizona School Choic, dft Glenn Dennard, dft Luis Moscoso [52-1] (SAT) (Entered: 07/08/2003)
		* * *
10/07/2003	57	NOTICE of Writ of Certiorari Grant by dfts (SAT) (Entered: 10/07/2003)
		* * *
08/23/2004		Appeal Remark; per Ninth Circuit docket; Supreme Court

		affirmed Ninth Circuit decision, re: 01-15901, 02-1809 appeal [38-1] (REW) (Entered: 08/23/2004)
08/23/2004	63	ORDER by Judge Earl H. Carroll, Mark W Killian is no longer a party to this action; motion to intervene dft by Arizona Christian [23-1] was denied without prejudice by order [54-1]; dft Hibbs shall file an answer or otherwise responsive pleading by 9/13/04; all motions to intervene and dispositive motions shall be filed or lodged by 9/30/04; all responses to motions to intervene and dispositive motions shall be filed or lodged by 10/29/04; all replies to motions to intervene and dispositive motions shall be filed or lodged by 11/15/04; intervenor-dft AZ School Choice Trusts' motion to dismiss case [52-1] shall follow the same briefing schedule outlined above; requests for oral argument denied pending further order of the court; parties shall confer pursuant to Rule 26(f) by 10/15/04 (cc: all counsel) (REW) (Entered: 08/23/2004)

08/24/2004	64	MOTION to intervene by Arizona Christian School Tuition Organization [64-1] (LSP) (Entered: 08/25/2004)
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		* * *
09/13/2004	67	ANSWER to complaint [1-1] by dft J Elliot Hibbs (SAT) (Entered: 09/14/2004)
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09/27/2004	71	AMENDED MOTION to Dismiss (case) by dft Arizona School Choic, dft Glenn Dennard, dft Luis Moscoso [71-1] (SAT) (Entered: 09/27/2004)
09/27/2004	71	MEMORANDUM of Points and Authorities IN SUPPORT by dft Arizona School Choic, dft Glenn Dennard, dft Luis Moscoso of Motion to Dismiss (case) by Arizona School Choic, dft Glenn Dennard, dft Luis Moscoso [71-1] (SAT) (Entered: 09/27/2004)
09/30/2004	72	MOTION for Judgment on the Pleadings by dft J Elliot Hibbs [72-1] (SAT) (Entered: 10/01/2004)

09/30/2004	72	MEMORANDUM of Points and Authorities by dft J Elliot Hibbs re: Motion for Judgment on the Pleadings by dft J Elliot Hibbs [72-1] (SAT) (Entered: 10/01/2004)
09/30/2004	73	MOTION to Dismiss as to intervenor-defendant Arizona Christian by intervenor-defendant Arizona Christian [73-1] (SAT) (Entered: 10/01/2004)
09/30/2004	73	NOTICE of Lodging Proposed Motion to Dismiss by intervenor-defendant Arizona Christian (lodged Motion to Dismiss and Memorandum of Points and Authorities held at docket clerk's desk) (SAT) (Entered: 10/01/2004)
09/30/2004		LODGED Motion to Dismiss and Memorandum of Points and Authorities in Support Thereof by intervenor-defendant Arizona Christian (placed on left side of file 11/15/04) (SAT) Modified on 11/15/2004 (Entered: 10/01/2004)
		* * *
10/29/2004		LODGED Plaintiffs' Response to Motion for Judgment on the Pleadings and Motions to Dismiss by plas (placed on left side of file 12/17/04) (SAT) Modified on 12/17/2004 (Entered:

		11/04/2004)
		* * *
11/15/2004		LODGED Reply to Plaintiffs' Response to Intervenor-Defendants's Motion to Dismiss, Reply to Plaintiffs' Response to Motions for Judgment on the Pleadings and Motions to Dismiss (lodged and placed on left side of file 12/17/04) by intervenor-defendant Arizona Christian (SAT) Modified on 12/17/2004 (Entered: 11/17/2004)
11/15/2004	77	REPLY by dft J Elliot Hibbs to response in Support of Motion for Judgment on the Pleadings by dft J Elliot Hibbs [72-1] (SAT) (Entered: 11/17/2004)
		* * *
03/25/2005	79	ORDER by Judge Earl H. Carroll granting Intervenor-Defendant Arizona Christian School Tuition Organization's Motion to Intervene by Arizona Christian School Tuition Organization [64-1]; FURTHER ORDERED granting ASCTs Motion to Dismiss (case) without prejudice by dft Arizona School Choic, dft Glenn Dennard, dft Luis Moscoso [71-1]; FURTHER ORDERED denying as moot Defendant Hibbs' Motion for Judgment on the Pleadings by dft J Elliot

		Hibbs [72-1]; FURTHER ORDERED denying as moot ACSTO's Motion to Dismiss as to intervenor-defendant Arizona Christian by intervenor-defendant Arizona Christian [73-1] (cc: all counsel) (SAT) (Entered: 03/25/2005)
03/25/2005	80	JUDGMENT: that the Court has granted the Defendants Motion to Dismiss, therefore the Plaintiff shall take nothing. This complaint and action are hereby dismissed. (cc: all counsel) re: judgment [80-1] (SAT) (Entered: 03/25/2005)
		* * *
03/25/2005	87	MOTION to Dismiss Case and Memorandum of Points and Authorities in Support Thereof by Arizona Christian School Tuition Organization. (filed nunc pro tunc as of 3/25/05 per order #86 filed 8/3/05) (REW,) (Entered: 08/03/2005)
03/25/2005	88	RESPONSE to Motions; re 72 Motion for Judgment on the Pleadings, 87 MOTION to Dismiss Case, 71 Motion to Dismiss Case filed by Kathleen M Winn, Diane Wolfthal, Maurice Wolfthal, Lynn Hoffman. (filed nunc pro tunc as of 3/25/05 per order #86 filed

		8/3/05)(REW,) Modified on 8/3/2005 (APJ,). (Entered: 08/03/2005)
03/25/2005	89	REPLY to Response to Motions; re 72 Motion for Judgment on the Pleadings, 87 MOTION to Dismiss Case, 71 Motion to Dismiss Case filed by Arizona Christian School Tuition Organization. (filed nunc pro tunc as of 3/25/05 per order #86 filed 8/3/05) (REW,) (Entered: 08/03/2005)
03/25/2005	90	REPLY to Response to Motions; re 72 Motion for Judgment on the Pleadings, 87 MOTION to Dismiss Case, 71 Motion to Dismiss Case filed by Arizona School Choice Trust. (filed nunc pro tunc as of 3/25/05 per order #86 filed 8/3/05) (REW,) (Entered: 08/03/2005)
		* * *
04/22/2005	81	NOTICE OF APPEAL by plas from District Court judgment [80-1], order [79-1] (cc: 9CCA/All Counsel/judge) (LAD) (Entered: 04/26/2005)
		* * *
08/03/2005	86	ORDER; Clerk shall file the following documents nunc pro tunc as of 3/25/05: Motion to Dismiss lodged 9/30/04, Response lodged 10/29/04, Replies lodged

United States Court of Appeals for the Ninth Circuit
No. 01-15901

05/09/2001	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: Fee payment is due 5/23/01 ; appellant's opening brief is due 6/18/01,, ; appellees' brief is due 7/18/01; [01-15901] (KKW)
		* * *
06/18/2001	15	Filed original and 15 copies aplts' opening brf (Informal: no) of 41 pages and five excerpts of record in 1 volume; served on 6/15/01. [01-15901] (XX)
		* * *
07/23/2001	18	Filed original and 15 copies aple's 27 page brf; served on 7/18/01. [01-15901] (XX)
		* * *
08/03/2001	20	Filed original and 15 copies aplts' rpy brf (Informal: no) of 14 pages; served on 8/1/01. [01-15901] (XX)
		* * *
06/11/2002	30	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Dorothy W. NELSON, Stephen R. REINHARDT [01-15901] (GB)
		* * *
10/03/2002	34	FILED OPINION: REVERSED and REMANDED. (Terminated on the Merits after Oral Hearing;

		Reversed; Written, Signed, Published. Mary M. SCHROEDER; Dorothy W. NELSON; Stephen R. REINHARDT, author) FILED AND ENTERED JUDGMENT. [01-15901] (XX)
		* * *
11/13/2002	40	Filed order (Mary M. SCHROEDER, Dorothy W. NELSON & Stephen R. REINHARDT) the parties are directed to file simultaneous brfs setting forth their respective positions on whether this case should be reheard en banc. The brfs shall not exceed 15 pages and shall be filed within 21 days from the filed date of this order. Fifty copies should be filed. [01-15901] (XX)
		* * *
12/30/2002	43	Rec'd original and 50 copies aple's suppl brf of 15 pages; served on 12/27/02. Deficient; covers entitled "Petition for Rehearing and Rehearing En Banc. Notified counsel to submit corrected covers entitled "Suppl Brf". [01-15901] (XX)
12/30/2002	44	Filed original and 50 copies aplts' suppl brf of 11 pages in response to order [40]; served on 12/27/02 to (PANEL & ALL ACTIVE

JUDGES). [01-15901] (XX)

* * *

12/31/2002	46	Filed original & 50 copies aple's suppl brf in response to order [40]; served on 12/27/02 to (PANEL & ALL ACTIVE JUDGES). [01-15901] (XX)

* * *

03/05/2003	50	Filed order FOR PUBLICATION (Mary M. SCHROEDER, Dorothy W. NELSON, Stephen R. REINHARDT,): ...The request for rehearing en banc is DENIED. KLEINFELD, Circuit Judge, with whom Circuit Judge O'SCANNLAIN joins, dissenting from denial of rehearing en banc. [01-15901]
03/17/2003	51	MANDATE ISSUED. Costs taxed against defendant in the amount of $383.80. [01-15901] (XX)

* * *

10/07/2003	53	Rec'd ntc from Supreme Court, petition for certiorari GRANTED on 9/30/03. Supreme Court No. 02-1809 to (PANEL). (XX)

* * *

06/18/2004	55	Rec'd copy of Supreme Court opinion dated 6/14/04 AFFIRMING 9th Cir.. Mdt will not issue for at least 25 days unless a timely petition for rehearing is filed to (PANEL).

[01-15901] (XX)

07/19/2004	56	Filed Supreme Court judgment; filed and entered in USSC No. 02-1809 on 7/16/04 AFFIRMED to (PANEL). [01-15901] (XX)

* * *

United States Court of Appeals for the Ninth Circuit
No. 05-15754

04/29/2005	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: Fee payment is due 5/13/05 ; appellant's designation of RT is due 5/2/05,, ; appellee's designation of RT is due 5/12/05,, ; appellant shall order transcript by 5/23/05,, ; court reporter shall file transcript in DC by 6/22/05; certificate of record shall be filed by 6/29/05 ; appellant's opening brief is due 8/8/05,, ; appellees' brief is due 9/7/05,, ; appellants' reply brief is due 9/21/05,, ; [05-15754] (KKW)
		* * *
08/10/2005	8	Filed original and 15 copies aplts opening brief (Informal: no) 50 pages; 5 excerpts of record (1 Exc.vol); served on 8/8/05 minor defcy: no stmt of rel cases, cert of incomplete) Notified counsel. [05-15754] (CW)
		* * *
09/02/2005	15	Filed aple Gale Garriott motion to strike aplts opn br, served on 9/1/05 PROMO (CW)
		* * *

09/07/2005	11	Filed original and 15 copies appellee Arizona Christian Sc's 53 pages brief, ; served on 9/6/05 [05-15754] (CW)
		* * *
09/07/2005	16	Filed Arizona Christian Sc motion to strike portions of aplts opn br served on 9/6/05 PROMO (CW)
		* * *
09/08/2005	18	Filed original and 15 copies aples Arizona School Choic, Luis Moscoso, Glenn Dennard's 29 pages brief, 1 Exc. vols' served on 9/7/05 [05 15754] (CW)
		* * *
09/20/2005	24	Filed aplts response to aples mtn to strike aplts br. served on 9/19/05 PROMO [05-15754] (CW)
09/22/2005	23	Filed original and 15 copies appellee Gale Garriott's 13 pages brief, ; served on 9/21/05 [05-15754] (CW)
		* * *
09/29/2005	26	Filed aple ACSTO's reply to aplts response to defs mtn to strike, served on 9/28/05 PROMO [05-15754] (CW)
09/29/2005	27	Filed Appellee Gale Garriott reply in support of def aple Garrett's mtn to strike opn br ;served on 9/28/05 PROMO [05-15754] (CW)
		* * *

10/25/2005	32	Rec'd errata to opn brief from aplts. (RECORDS) [05-15754] (CW)
10/28/2005	33	Filed original and 15 copies Kathleen M Winn, Diane Wolfthal, Maurice Wolfthal, Lynn Hoffman reply brief, (Informal: no) 27 pages; served on 10/27/05 [05-15754] (CW)
11/07/2005	34	Filed aplts mtn to take judicial notice [05-15754] served on 11/4/05 PROMO [05-15754] (CW)
		* * *
03/09/2007	48	Filed Arizona Christian Sc additional citations, served on 3/8/07 PANEL [05-15754] (CW)
10/02/2007	49	Filed order (Dorothy W. NELSON, Stephen R. REINHARDT, Raymond C. FISHER): The parties are directed to submit supp briefs in answer to the following question: Whether Aplt-Taxpayers have standing to bring suit in light of the USSC's decision in DaimlerChrysler Corp v. Cuno, 126 S. Ct 1854 (2006) and this ct subsequent decision in Arakaki v. Lingle 477 F.3d 1048 (9th Cir. 2007)? Aplts shall submit a brief, no longer than 15 pgs in length within 21 days of the issuance of this order. Aples shall submit an

		ans br, no longer than 15 pgs in length, within 10 days of the date aplts supp brief is filed. Aplts shall submit a rpy br, no longer than 7 pgs in length, within 7 days of the date of aples ans br is filed. FAXED TO CSL 2:50 [05-15754] (CW)
		* * *
10/04/2007	51	Filed order (Dorothy W. NELSON, Stephen R. REINHARDT, Raymond C. FISHER): Def aples Garriott's mtn to strike portions of the opn br is denied. [05-15754] (CW)
10/24/2007	52	Filed original and 6 copies Appellant Kathleen M Winn, Appellant Diane Wolfthal, Appellant Maurice Wolfthal, Appellant Lynn Hoffman supplemental brief of 9 pages, with minor defcy: missing 9 copies; notified counsel; served on 10/23/07, FEDEX TO PANEL [05-15754] (LA)
		* * *
11/06/2007	57	Filed original and 15 copies Appellee Arizona Christian Sc supplemental brief of 15 pages, served on 11/5/07 FEDEX TO PREV PNL [05-15754] (CW)
11/07/2007	58	Filed original and 15 copies Appellee Gale Garriott supplemental brief of 2 pages,

		served on 11/6/07 FEDEX TO PRV PNL [05-15754] (CW)
		* * *
11/08/2007	59	Filed original and 15 copies aples Arizona School Choic, Luis Moscoso, Gale Garriott supplemental brief of 15 pages, served on 11/6/07 FEDEX TO PRV PNL [05-15754] (CW)
		* * *
11/19/2007	64	Filed original and 16 copies Appellants Kathleen M Winn, Diane Wolfthal, Maurice Wolfthal, Lynn Hoffman supplemental brief of 7 pages, served on 11/15/07. FEDEX TO PRV PNL [05-15754] (LA)
		* * *
01/14/2008	66	Received csl Paul Bender for aplts letter dated 1/7/08 re: Update to statement in opn br in regards to the Arizona income tax credit for contributions to school tuition organizations.... FAXED TO PANEL [05-15754] (CW)
		* * *
01/22/2008	68	Received Appellant Kathleen M Winn's addendum to opening brief, served on 1/15/08. FEDEX TO PANEL [05-15754] (JE)
01/24/2008	69	ARGUED AND SUBMITTED TO Dorothy W. NELSON, Stephen R. REINHARDT, Raymond C.

		FISHER [05-15754] (LN)
		* * *
03/16/2009	71	Filed (ECF) Appellees Arizona School Choice Trust, Glenn Dennard and Luis Moscoso citation of supplemental authorities. Date of service: 03/16/2009. [6846027] (TDK)
03/19/2009	72	Filed (ECF) Appellee Arizona Christian School Tuition Organization citation of supplemental authorities. Date of service: 03/19/2009. [6851378] (JDT)
		* * *
03/19/2009	75	Filed (ECF) Appellants Lynn Hoffman, Kathleen M Winn, Diane Wolfthal and Maurice Wolfthal citation of supplemental authorities. Date of service: 03/19/2009. [6852084] (MSC)
03/23/2009	76	Filed (ECF) Appellants Lynn Hoffman, Kathleen M Winn, Diane Wolfthal and Maurice Wolfthal citation of supplemental authorities. Date of service: 03/23/2009. [6855864] (MSC)
04/21/2009	77	FILED OPINION (DOROTHY W. NELSON, STEPHEN R. REINHARDT and RAYMOND C. FISHER) REVERSED AND REMANDED. Judge: DWN , Judge: SR , Judge: RCF

		Authoring. FILED AND ENTERED JUDGMENT. (PH)
		* * *
05/14/2009	82	Filed (ECF) Appellees Arizona School Choice Trust, Glenn Dennard and Luis Moscoso petition for rehearing en banc (from 04/21/2009 opinion). Date of service: 05/14/2009. [6920765] (TDK)
05/14/2009	83	Filed (ECF) Appellee Arizona Christian School Tuition Organization petition for rehearing en banc (from 04/21/2009 opinion). Date of service: 05/14/2009. [6921161] (JDT)
05/14/2009	84	Filed (ECF) Appellee Gale Garriott petition for rehearing en banc (from 04/21/2009 opinion). Date of service: 04/14/2009. [6921623] (PSB)
		* * *
06/08/2009	87	Filed (ECF) Appellants Lynn Hoffman, Kathleen M Winn, Diane Wolfthal and Maurice Wolfthal response to Petition for Rehearing En Banc (ECF Filing). Date of service: 06/08/2009. [6948665].--[COURT UPDATE: replaced PDF with searchable version--06/08/2009 by ASW] (MSC)
		* * *

10/21/2009	90	Filed order (DOROTHY W. NELSON, STEPHEN R. REINHARDT and RAYMOND C. FISHER) Judges Reinhardt and Fisher voted to reject the petitions for rehearing en banc and Judge Nelson so recommended. The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The three petitions for rehearing en banc, filed May 14, 2009, are denied. (all active, any interested senior judges) filed by Appellee Gale Garriott [7102055] (PH)
		* * *
10/29/2009	92	Filed (ECF) Appellees Arizona Christian School Tuition Organization, Arizona School Choice Trust, Glenn Dennard and Luis Moscoso Motion to stay the mandate. Date of service: 10/29/2009. [7112955] (TDK)
11/12/2009	93	Filed (ECF) Appellants Lynn Hoffman, Kathleen M Winn, Diane Wolfthal and Maurice Wolfthal response opposing

		motion (Motion (ECF Filing) ,Motion (ECF Filing) motion to stay the mandate). Date of service: 11/12/2009 [7128466] (IMH)
11/16/2009	94	Filed order (DOROTHY W. NELSON, STEPHEN R. REINHARDT and RAYMOND C. FISHER): The motion to stay the mandate, filed October 29, 2009 by appellees Arizona School Choice Trust, et al., and Arizona Christian School Tuition Organization, is granted. [7131645] (AF)
01/19/2010	95	Filed (ECF) Appellees Arizona Christian School Tuition Organization, Arizona School Choice Trust, Glenn Dennard, Gale Garriott and Luis Moscoso Correspondence: NOTICE THAT THE UNITED STATES SUPREME COURT HAS GRANTED AN EXTENSION OF TIME TO FILE THE PETITIONS FOR WRIT OF CERTIORARI. Date of service: 01/19/2010 [7198533] (TDK)
01/21/2010	96	Received letter from the Supreme Court dated 01/15/2010. Time to file petition for writ of certiorari has been extended to 2/18/10. [7205274] (TB)

* * *

02/25/2010	98	Received notice from the Supreme Court: petition for certiorari filed on 02/18/2010. Supreme Court Number 09-987. [7251085] (TB)
02/25/2010	99	Received notice from the Supreme Court: petition for certiorari filed on 02/18/2010. Supreme Court Number 09-988. [7251161] (TB)
03/02/2010	97	Received notice from the Supreme Court: petition for certiorari filed on 02/18/2010. Supreme Court Number 09-991. [7249097] (TB)
05/27/2010	100	Received notice from the Supreme Court. Petition for certiorari GRANTED on 05/24/2010. Supreme Court Numbers 09-987, 09-991. The petition for writ of certiorari is granted. These cases are consolidated and a total of one hour is alloted for oral argument. [7353045] (TB)

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Attorneys for Intervenor-defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer,	)	No. CIV 00-0287-PHX-EHC
Plaintiffs,	)	**AMENDED MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**
vs.	)	
J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,	)	(Assigned to the Honorable Earl H. Carroll)
Defendant,	)	
ARIZONA SCHOOL	)	

CHOICE TRUST, a Qualified School Tuition Organization; GLENN DENNARD, Parent; LUIS MOSCOSO, Parent	)
Intervenor-defendants	)

[Pleading Omitted, Select Exhibit Attached]

APPENDIX 1

POLICY *report*
Goldwater Institute
No. 186 | December 11, 2003

The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students

by Carrie Lips Lukas, Director of Policy, Independent Women's Forum

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EXECUTIVE SUMMARY

Six years ago, Arizona policymakers created a revolutionary school choice program by allowing a $500 dollar for-dollar income tax credit for contributions to organizations that give students scholarships to attend private elementary and secondary schools. In 2001, the Cato Institute published a study evaluating the first years of the program and analyzing its potential impact. This paper is a follow-up to that study, assessing the recent trends in the program, its impact on Arizona's educational system, and identifying potential reforms.

Since the program's inception, taxpayers have donated $83.5 million to 47 nonprofit organizations that helped send thousands of students to schools of their choice. Most scholarships were distributed based on financial need to students previously enrolled in private schools. Although the exact

portion of the more than 19,000 students currently using scholarships who otherwise would have attended public school is unknown, it is likely that between 2,000 and 4,000 students would return to public school without the scholarship tax credit.

Although the state loses money when taxpayers use the credit, localities and the state save money when students who would have otherwise been educated at public expense switch to private school. The state lost $26.3 million in revenue through use of the credit in 2002. Yet the savings incurred by transferring students offset much of that loss, leaving the total revenue loss between $7.5 and $13.4 million.

As donations increase, it is likely that a greater portion of scholarships will be used by students newly transferring into private school from public school. Therefore, it is probable that future savings will fully offset the revenue loss, eventually saving taxpayers money.

Policymakers could consider several modifications to the tax credit program. The potential benefits and drawbacks of those reforms are outlined in this paper. In general, policymakers should consider ways to improve and expand the program to help more families send their children to private schools of their choice.

GOLDWATER
INSTITUTE

The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students

by Carrie Lips Lukas, Director of Policy, Independent Women's Forum

Introduction

In 1997, Arizona passed a bill called the "Private School Tuition Tax Credit," which enabled Arizona taxpayers to receive a dollar-for-dollar tax credit of up to $500 against their state income tax for donations to approved organizations that provide students with scholarships to attend private schools. This credit became effective for the taxable year beginning January 1, 1998. Therefore, 1998 was the first year during which taxpayers could claim this credit. In the November 2000 election, Proposition 301 increased the amount of the available tax credit to $625 for married couples, effective January 1, 2001. Previously, two married taxpayers filing a joint return were only allowed to claim a maximum credit of $500.

Facing a financial crisis, with current deficits in Arizona expected to be almost $1 billion, some policymakers have proposed eliminating the scholarship tax credit.[1] Governor Janet Napolitano convened a Citizens' Finance Review Commission to consider ways to address this deficit. The commission issued a report on August 22, 2003, calling for the repeal of all personal income tax credits in Arizona except those that alleviate the tax

burden on low-income and disabled persons, including the repeal of the private school tax credit.[2] In recommending the elimination of the scholarship tax credit, the review commission cited research from Arizona State University's Education Policy Studies Laboratory (EPSL), which concluded the tax credit is expensive for the state and fails to help poor students.[3]

This study attempts to more fully inform this discussion. It is particularly important given significant weaknesses in the EPSL research. For example, EPSL researchers focused on only one side of the ledger – loss of revenue to the state – and failed to take into account any savings gained when students use scholarships to switch from public to private schools. While the EPSL study notes the difficulty of assessing the program's effects, given limited public information, the researchers did not compensate by contacting the school tuition organizations to discuss how they allocate scholarships.[4]

This study evaluates the tax credit's impact based on the number of taxpayers participating, the practices of school tuition organizations, and the students using school tuition organization scholarships. It considers the impact on the state budget and identifies policy options that could improve the program's effectiveness.

To assess the effects of the tax credit, the Goldwater Institute surveyed the 47 school tuition organizations identified on the Arizona Department

of Revenue's website. Eighteen surveys were returned. The Goldwater Institute also gathered supplemental data from several other organizations, including the Arizona Department of Revenue, the Arizona Department of Education, and the U.S. Department of Education.

Significantly, five of the six largest school tuition organizations returned the survey. These six school tuition organizations are the only organizations that raised more than $1 million in 2002, and they account for 73 percent of the total donations received.

Taxpayer Participation

Since the tax credit first became available in 1998, the number of taxpayers donating to school tuition organizations and the total amount donated have increased dramatically. In 1998, just 4,248 donors claimed the scholarship tax credit and contributed to a school tuition organization. Those organizations helped 326 students in the first year. In 2002, school tuition organizations raised $26.2 million from more than 50,000 donors, and distributed an estimated $20 million to more than 19,000 students. In the program's first five years, school tuition organizations raised more than $84 million, of which more than $52 million has already been distributed in scholarships.

The rate of growth of donations and taxpayer participation in the program suggests significant support for the

program. In fact, the $26.2 million of contributions the tax credit generated in 2002 exceeds the $21.9 million that was predicted in the "highgrowth" scenario projected in a 2001 Cato Institute study.

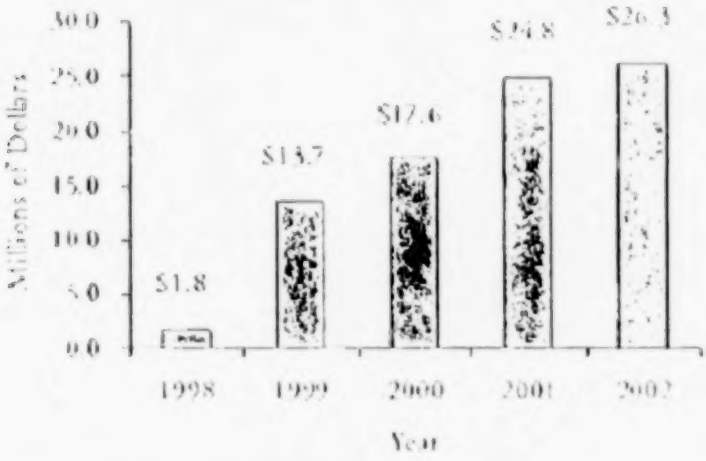
The rate of growth of donations and taxpayer participation in the program suggests significant support for the program. In fact, the $26.2 million of contributions the tax credit generated in 2002 exceeds the $21.9 million that was predicted in the "high-growth" scenario projected in a 2001 Cato Institute study evaluating the program's first years.[5]

Table 1. Amount Donated to and Distributed by School Tuition Organizations

Year	Donations ($)	Donors	Amount Distributed ($)	Number of Scholarships
1998	1,816,299	4,248	167,650	326
1999	13,716,791	31,892	2,377,819	3,727
2000	17,620,022	38,084	13,609,939	15,377
2001	24,838,082	46,546	16,120,146	18,058
2002	26,254,763	50,191	19,968,786	19,373
Total	84,245,957	170,961	52,244,340	56,861

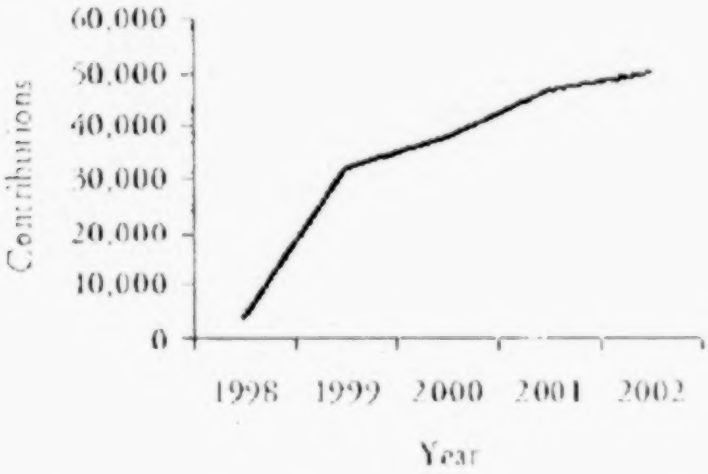
Source: Arizona Department of Revenue, Office of Economic Research and Analysis, October 2003, and author calculations.

Figure 1. Total Contributions to School Tuition Organizations



Source: Arizona Department of Revenue, Office of Economic Research and Analysis, October 2003.

Figure 2. Growth in Scholarship Tax Credit Contributions



Source: Arizona Department of Revenue, Office of Economic Research and Analysis, October 2003.

As shown in Table 2, there were just over 2 million Arizona taxpayers in 2002. The more than 50,000 taxpayers who chose to take the scholarship tax credit account for 2.5 percent of all taxpayers. In total, one out of every forty taxpayers in Arizona took advantage of the opportunity to contribute.

To more accurately quantify participation in the program, the total number of those who contributed to the program should be compared to those with a tax liability of at least $500, who would therefore be able to make full use of the credit. As shown in Table 2, the average liability of taxpayers with federal adjusted gross incomes of between $30,000 and $40,000 was just over $600. Assuming that roughly half of that income group's liability was greater than $500, the total number of taxpayers able to take full advantage of the tax credit was 972,713. Therefore, the 50,000 taxpayers who contributed to school tuition organizations account for 5.2 percent of the taxpayers who could have taken the tax credit. In other words, more than one out of every 20 taxpayers able to take the tax credit did so in 2002.

More than one out of every 20 taxpayers able to take the tax credit did so in 2002.

Table 2. Arizona Taxpayers by Income

Federal Adjusted Gross Income	# of Filers	% of Total	Liability ($)	% of Total	Average Liability ($)
Negative Income	28,197	1.41	548,059	0.03	19
$0 to $1,999	52,848	2.64	117,355	0.01	2
$2,000 to $5,999	145,522	7.27	411,616	0.02	3
$6,000 to $9,999	160,614	8.02	6,408,039	0.30	40
$10,000 to $13,999	162,303	8.10	15,135,541	0.71	93
$14,000 to $19,999	240,703	12.02	42,293,924	1.98	176
$20,000 to $24,999	168,877	8.43	51,518,668	2.41	305
$25,000 to $29,999	141,489	7.07	61,082,591	2.86	432
$30,000 to $39,999	219,127	10.94	131,647,869	6.17	601
$40,000 to $49,999	160,580	8.02	132,741,351	6.22	827
$50,000 to $74,999	259,616	12.96	315,263,098	14.77	1,214
$75,000 to $99,999	121,107	6.05	230,426,082	10.79	1,903
$100,000 to $199,999	106,342	5.31	369,151,929	17.29	3,471

Federal Adjusted Gross Income	# of Filers	% of Total	Liability ($)	% of Total	Average Liability ($)
$200,000 to $499,999	27,197	1.36	272,404,079	12.76	10,016
$500,000 to $999,999	5,113	0.26	141,192,315	6.61	27,614
$1,000,000 to $4,999,999	2,586	0.13	214,034,252	10.03	82,767
$5,000,000 and over	300	0.01	150,577,584	7.05	501,925
Total	2,002,521		2,134,954,358		1,066

Source: Arizona Department of Revenue 2002 Annual Report, Tables 30 and 31.

> *The amount of participation demonstrates a high level of awareness of and commitment to the program among taxpayers. It is particularly notable given the economic downturn in 2001.*

This amount of participation demonstrates a high level of awareness of and commitment to the program among taxpayers. It is particularly notable given the economic downturn in 2001. Even though contributions to school tuition organizations do not cost extra for those with a positive income tax liability, there is a lag between the time individuals make their donations and receive the tax credit.

Therefore, one might expect the recession and continued slow economic growth to discourage people from making the upfront payment the program requires.

There are several reasons to expect that participation will continue to increase. The economy appears to be improving, which may encourage people to donate despite the lag time. More students are receiving scholarships, which drives awareness of the program and in turn may help increase taxpayer participation. Finally, as school tuition organizations mature and the administrative process becomes more routine, they will likely devote more resources to raising awareness and encouraging donations.

It should be noted that the information provided by the Arizona Department of Revenue is not comprehensive. For example, although the Department of Revenue had an estimate for the how much the Catholic Tuition Organization of the Diocese of Tucson received in contributions, they did not have a number for the total amount distributed in 2002. The result is that the total amount distributed in scholarships is misleadingly low. If one assumes that the Catholic Tuition Organization of the Diocese of Tucson distributed the same amount that it distributed in the preceeding year — $14.7 million — then the total amount distributed by school tuition organizations as a result of the tax credit program in 2002 becomes $21.7 million.

The lack of comprehensive data makes it more difficult for researchers to analyze the program's effects. However, on May 5, 2003, Governor Napolitano signed into law a bill creating new reporting requirements for school tuition organizations. That law requires that each year school tuition organizations provide the Arizona state government with the total number and amount of contributions received, the total number of children awarded scholarships, the dollar amount of scholarships, and the names of schools that received those scholarships.[5] 2003 will be the first year that these reporting requirements are in effect. Therefore, after receiving this information by February 28, 2004, Arizona policy-makers will have a better understanding of the program's effects.

School Tuition Organizations

There is a wide variety of school tuition organizations accepting contributions from taxpayers. The number of scholarships distributed by an individual school tuition organization ranges from nearly 7,000 to just 10. Tables 3 and 4 provide an overview of the amount of money received and distributed by school tuition organizations in 2002.

As demonstrated by the number and diversity of school tuition organizations, taxpayers have the ability to choose an organization that best reflects their values. While many of the organizations have a religious orientation, there are several secular school tuition organizations that cater specifically to low

income students or to those using a specific curriculum, such as Montessori.

The only legal requirements for a school tuition organization are that scholarships must be redeemable at more than one qualified school, and that those schools must be private primary or secondary schools in Arizona that do not discriminate on the basis of race, color, handicap, familial status, or national origin. There is little public information about the procedures that school tuition organizations use to distribute their scholarships.

The Goldwater Institute survey attempted to gain insight into the allocation process by asking school tuition organizations to describe the criteria used to award scholarships. Eighteen of the 47 school tuition organizations returned surveys.

> *As demonstrated by the number and diversity of school tuition organizations, taxpayers have the ability to choose an organization that best reflects their values.*

Table 3. Individual Donations to Arizona Tuition Organizations, 2002

School Tuition Organization	Returned Survey?	Donations	Amount Donated ($)
Arizona Adventist Scholarships, Inc.	No	642	319,123

School Tuition Organization	Returned Survey?	Donations	Amount Donated ($)
Arizona Christian School Tuition Organization	Yes	10,754	5,670,482
Arizona Episcopal Schools Foundation	No	1,074	527,369
Arizona Independent Schools Scholarship Foundation	No	1,032	540,345
Arizona International Academy Scholarship Fund	Yes	44	23,045
Arizona Native Scholastic and Enrichment Resources	No	59	28,819
Arizona Private Education Scholarship Fund	No	711	392,017
Arizona Scholarship Fund	Yes	2,228	1,142,188
Arizona School Choice Trust	Yes	3,024	1,473,144
Arizona Waldorf Scholarship Fund	No	124	58,116
BEST Student Fund	No	252	127,525
Bret Reed Freesmeyer Memorial Scholarship Fund	No	106	66,313
Brophy Community Foundation	Yes	1,567	757,589
Garden Schools Scholarship Fund	No	10	5,050

School Tuition Organization	Returned Survey?	Donations	Amount Donated ($)
Catholic Tuition Organization of the Diocese of Phoenix	Yes	13,718	7,214,836
Catholic Tuition Organization of the Diocese of Tucson	No	6,523	2,661,904
Chabad Tuition Organization	No	176	71,835
Chaparral Mission Scholarship Fund	No	200	104,638
Chedar Scholarship Organization, Inc.	No	–	–
Christ Lutheran School Foundation	No	330	172,481
Christian Scholarship Fund of Arizona	Yes	730	360,880
Cochise Christian School Tuition Organization	Yes	–	24,730
Dynamite Montessori Foundation	No		
Educare Scholarship Fund	No	177	92,010
Flagstaff Christian Scholarship Fund	Yes	241	102,083
Florence Engelhardt/Pappas Foundation	Yes	340	176,938
Foundation for Montessori Scholarships	No	111	56,535

School Tuition Organization	Returned Survey?	Donations	Amount Donated ($)
Higher Education of Lutherans Program	Yes	1,082	564,709
Institute for Better Education	No	1,555	781,803
Jewish Community Day School Scholarship Fund	Yes	N/A	1,058,679
Lutheran Education Foundation	Yes	498	227,959
Maranatha Christian Co Op Tuition Fund	No	—	—
Montessori Centre School Tuition Organization	No	37	19,735
Montessori Scholarship Organization	No	265	136,505
Montessori School Tuition Organization[A]	Yes	—	—
New Way Learning Academy STO	No	217	109,177
Northern Arizona Christian School Scholarship Fund	No	256	106,371
Orme Primavera Schools Foundation	No	251	128,430
Patagonia Scholarship Fund	No	34	16,625
Prescott Christian School Scholarship Foundation	Yes	366	178,158

School Tuition Organization	Returned Survey?	Donations	Amount Donated ($)
School Tuition Association of Yuma	No	365	193,735
Schools With Heart Foundation	Yes	322	157,593
Shepherd of the Desert Education Foundation	Yes	143	80,675
Southern Arizona Foundation for Education	No	430	225,344
Tempe Montessori Parents Organization	Yes	145	72,250
Tesseract Tuition Organization	No	–	–
VVBC Christian Education Fund	No	52	27,050
Total	18 Surveys	50,191	26,254,763

*No longer in operation.

Sources: Arizona Department of Revenue, as of October 1, 2003, and information obtained from the Goldwater Institute survey.

> *By focusing on the policies these major school tuition organizations follow, a relatively accurate picture of how scholarships are allocated can be gleaned*

Five of the six largest school tuition organizations, which account for 73 percent of the total donations received, returned the survey. These

six school tuition organizations are the only organizations that raised more than $1 million in 2002. By focusing on the policies these major school tuition organizations follow, a relatively accurate picture of how scholarships are allocated can be gleaned.

The largest and third largest organizations are the Catholic Tuition Organizations of the Diocese of Phoenix (CTODP) and Tucson. Together they raised nearly $40 million, accounting for 38 percent of the total tax credit revenue raised through the program.

The application for a scholarship from the CTODP reveals the organization's mission. The only criteria considered are financial need and that the student be enrolled in a diocesan Catholic school in the Diocese of Phoenix, of which there are 36 as of 2003-2004. Not surprisingly, the CTODP estimates that 84 percent of its scholarships are used by students already enrolled in private school. However, that still leaves nearly 1,000 CTODP scholarship recipients who were previously enrolled in public schools.

Nationwide, Catholic schools educate nearly half of all private school students, while other religious schools account for another 36 percent.[7] It is not surprising that two of the top three school tuition organizations were formed to support the well-organized Catholic school system. As a general principle, Catholic schools strive to provide an affordable education. The average tuition nationwide at Catholic schools was just $3,236 for the 1999-2000

school year, compared to an average tuition of $4,063 at other religious schools and $10,992 at nonsectarian schools.[8] Therefore, scholarship money used by the Catholic school system is likely used by families with relatively modest incomes, and contributes to a school system that educates roughly 22,000 students in Arizona, assuming Arizona Catholic schools educate a similar proportion of private students as the rest of the nation.

> *As a general principle, Catholic schools strive to provide an affordable education. The average tuition nationwide at Catholic schools was just $3,236 for the 1999-2000 school year, compared to an average tuition of $4,063 at other religious schools and $10,992 at nonsectarian schools.*

Table 4. Scholarships Distributed by Arizona Tuition Organizations, 2002

School Tuition Organization	Number of Scholarships	Amount Distributed ($)	Average Scholarship ($)
Arizona Adventist Scholarships, Inc.	621	262,057	422
Arizona Christian School Tuition Organization	3,647	4,593,080	1,259
Arizona Episcopal Schools Foundation	147	466,645	3,174
Arizona Independent Schools Scholarship Fdn	101	491,051	4,862

School Tuition Organization	Number of Scholarships	Amount Distributed ($)	Average Scholarship ($)
Arizona International Academy Scholarship Fund	31	18,554	599
Arizona Native Scholastic and Enrichment Res.	22	49,100	2,232
Arizona Private Education Scholarship Fund	228	264,692	1,161
Arizona Scholarship Fund	805	757,410	941
Arizona School Choice Trust	757	957,686	1,265
Arizona Waldorf Scholarship Fund	37	$52,304	1,414
BEST Student Fund	84	107,677	1,282
Bret Reed Freesmeyer Memorial Scholarship Fund	27	$58,835	2,179
Brophy Community Foundation	333	709,390	2,130
Carden Schools Scholarship Fund	9	$10,625	1,181
Catholic Tuition Organization of the Diocese of Phx	6,942	7,014,675	1,010
Catholic Tuition Organization of the Diocese of Tuc	2,427	–	–
Chabad Tuition Organization		48,400	–

School Tuition Organization	Number of Scholarships	Amount Distributed ($)	Average Scholarship ($)
Chaparral Mission Scholarship Fund		103,592	
Chedar Scholarship Organization, Inc.			–
Christ Lutheran School Foundation	85	135,848	1,598
Christian Scholarship Fund of Arizona	160	260,000	1,625
Cochise Christian School Tuition Organization	39	27,499	705
Dynamite Montessori Foundation	–	–	
Educare Scholarship Fund	141	133,210	$945
Flagstaff Christian Scholarship Fund	83	96,988	$1,169
Florence Engelhardt/Pappas Foundation	23	146,887	$6,386
Foundation for Montessori Scholarships		36,975	–
Higher Education of Lutherans Program (HELP)	820	535,307	$653
Institute for Better Education	624	535,139	$858
Jewish Community Day School Scholarship Fund	187	856,396	$4,580

School Tuition Organization	Number of Scholarships	Amount Distributed ($)	Average Scholarship ($)
Lutheran Education Foundation	133	293,776	$2,209
Maranatha Christian Co-Op Tuition Fund	–	–	–
Montessori Centre School Tuition Organization	15	21,158	$1,411
Montessori Scholarship Organization	97	140,974	$1,453
Montessori School Tuition Organization	–	–	–
New Way Learning Academy STO			–
Northern Arizona Christian School Scholarship Fund	185	89,970	486
Orme Primavera Schools Foundation	48	106,617	2,221
Patagonia Scholarship Fund	–	13,570	–
Prescott Christian School Scholarship Foundation	197	190,860	969
School Tuition Association of Yuma	206	190,808	926
Schools With Heart Foundation	66	140,378	2,127
Shepherd of the Desert Education Foundation	29	21,429	739

School Tuition Organization	Number of Scholarships	Amount Distributed ($)	Average Scholarship ($)
Southern Arizona Foundation for Education (SAFE)	–	–	–
Tempe Montessori Parents Organization	–	–	–
Tesseract Tuition Organization	–	–	–
VVBC Christian Education Fund	17	29,224	1,719
Total	19,373	19,968,786	1,031

Sources: Arizona Department of Revenue, as of October 1, 2003, and information obtained from the Goldwater Institute survey.

> *In 2002, the ACSTO raised $5.7 million. Thus far, the organization has distributed an estimated $5.3 million to 3,895 students for the 2003-2004 school year.*

The second largest school tuition organization is the Arizona Christian School Tuition Organization, Inc. (ACSTO). In 2002, the ACSTO raised $5.7 million. Thus far, the organization has distributed an estimated $5.3 million to 3,895 students for the 20032004 school year. The ACSTO works with more than 145 schools to raise awareness about the availability of scholarships.

ACSTO scholarships are awarded based on financial need and an application. The application requires a narrative discussing the student's character and community involvement, and it allows for the inclusion of up to three recommendation letters. A selection committee evaluates applications and generates a raw number used to rank each applicant's financial need. The selection committee has complete discretion over the allocation of scholarships.

It is notable that donors to ACSTO may designate their funds to a particular school and may recommend a student, an option exercised by roughly two-thirds of ACSTO donors. While the selection committee considers donor recommendations, it retains complete discretion over whether to award a scholarship to any particular student.

Arizona School Choice Trust (ASCT) is Arizona's fourth largest school tuition organization. As of September 2003, approximately 600 students were attending private schools on ASCT scholarships, valued at more than $900,000. ASCT is expressly devoted to helping low-income students. As shown in Table 5, to be eligible for ASCT scholarships, applicants must be below an income threshold based on household size. In the 2002-2003 school year, the average ASCT scholarship recipient had a household income of $29,182.

ASCT scholarship amounts are scaled according to family income. For example, in the 2003-2004

school year, a family of four with an adjusted income of $48,870 would receive a scholarship for 25 percent of tuition, while a family of four with an adjusted income of $18,100 would receive 75 percent of the cost of tuition. The average scholarship was $1,377, leaving the family responsible for $1,489.[9]

> *As of September 2003, approximately 600 students were attending private schools on ASCT scholarships, valued at more than $900,000. ASCT is expressly devoted to helping low-income students.*

Table 5. Arizona School Choice Trust Income Thresholds

	2002 Total Household Income ($)		
	Percent of Tuition Covered		
Household Size	75%	50%	25%
2	11,940	22,089	32,238
3	15,020	33,485	40,544
4	18,100	33,485	48,870
5	21,180	39,183	57,186
6	24,260	44,881	65,502
7	27,340	50,579	73,818
Each Additional Dependent, add:	3,080	5,698	8,316

Source: Arizona School Choice Trust, http://www.asct.org/apply.htm.

ASCT estimates that a little more than half (54 percent) of its scholarship recipients were already enrolled in private school when they received

scholarships. However, financial need is the only criterion taken into account, and ASCT awards scholarships to qualifying candidates on a first-come, first-served basis.

Although ASCT states that most applicants usually learn of the school tuition organization from the private school they either attend or hope to attend, ASCT also raises awareness of its organization – in hopes of generating contributions as well as attracting scholarship applicants – through radio advertisements, newspaper mentions, and public events.

> *Numerous organizations reported having scholarship waiting lists. Only taking into account organizations that responded to the survey, more than 5,700 students in Arizona are on scholarship waiting lists.*

The Jewish Community Day School Scholarship Fund, the sixth largest school tuition organization, also focuses on financial need when providing scholarships and requests an applicant's tax returns and W2s. The Fund estimates that one quarter of its scholarship recipients had previously been in public school. The Jewish Community Day School Fund had one paid employee, and used a variety of methods to advertise its school tuition organization, including direct mailings, newspapers, phone banks, and press events.

The other school tuition organizations that responded to the survey follow similar procedures for allocating scholarships and attempt to raise awareness among donors and potential applicants. All but one small organization stated that financial need was considered in scholarship allocation. While many school tuition organizations allow donors to recommend a scholarship recipient, they also state that a donor's recommendation does not guarantee that a scholarship will be awarded to that student, and that scholarship decisions are made by an independent selection committee.

Numerous organizations reported having scholarship waiting lists. Arizona School Choice Trust estimates that more than 2,000 students are on its scholarship waiting list. Only taking into account organizations that responded to the survey, more than 5,700 students in Arizona are on scholarship waiting lists.

Costs

In 2002, taxpayers claimed $26.2 million in deductions for contributions to school tuition organizations. However, that loss of revenue to the state is just one side of the ledger. It must be compared to savings generated when students use scholarships to transfer from public schools to private schools.

The U.S. Department of Education's National Center for Education Statistics lists Arizona's 2001 per-pupil expenditure as $5,278.[10] The federal

government provides roughly 10.7 percent of this funding, leaving the state and localities paying approximately $4,715 per pupil.

Money used to provide scholarships to students who would have been able to attend private school without the scholarship is a loss in terms of the state budget. However, the state and localities save roughly $4,715 when a student who would have otherwise been educated at public expense in a public school transfers to private school.

Some critics of school choice programs fail to account for the savings generated when students leave the public school system. For example, Glen Wilson's oft-cited Arizona State University EPSL study ignores the possibility that the state and local governments would receive any savings from students transferring from public to private schools.[11] In his calculation, all students currently attending public schools could leave, and the state's education costs would remain.

However, there clearly are savings associated with having fewer children to educate at public expense. It is helpful to consider the opposite scenario, in which several thousand additional students would enter the public school system absent the tuition tax credit program. It is obvious that there would be additional costs to educating those students. Clearly, if this relationship holds when adding students, it must also hold when subtracting them. The best estimate for the

marginal cost of an additional student in Arizona is the per-pupil expenditure, or $4,715.

In fact, there may be additional costs: the need for more teachers, new school buildings, or additional equipment. For example, the National Education Association's 2002 Report on School Modernization found that "Arizona faces an estimated $5.7 billion cost for school modernization, including $4.7 billion for infrastructure and $921 million for technology needs."[12] It is reasonable to assume that if a significant number of students were removed from public school classrooms and placed in private schools, Arizona would be relieved of some of the estimated $5.7 billion school modernization expense. However, for these calculations, the per-pupil cost is used as an estimate of the cost of educating an additional student in a public school and the amount saved if that student goes elsewhere.

> *There clearly are savings associated with having fewer children to educate at public expense. Consider the scenario in which several thousand additional students would enter the public school system absent the tuition tax credit program. It is obvious that there would be additional costs to educating those students.*

Unfortunately, there is no definitive way to know just how many tax credit scholarship recipients would reenroll in public school if the scholarship

were not available. The answer lies somewhere between 0 and 100 percent of the scholarships being used for new enrollees. Using the information obtained from the school tuition organizations, a best guess can be generated.

Eighteen school tuition organizations responded to the survey, which asked them to estimate the portion of their scholarship recipients that had previously attended public or charter schools. Taken together, the school tuition organizations estimate that 1,810 of their scholarship recipients transferred from public to private school as a result of receiving scholarships. As shown in Table 6, these transfers saved the state $8.5 million. That $8.5 million savings offsets a portion of the total revenue lost in 2002, bringing the total cost of the program to $17.7 million.

It is reasonable to assume that school tuition organizations that did not return the survey gave a portion of their scholarships to students who previously attended public school. It could also be assumed that the non-reporting school tuition organizations award scholarships to public school students at the same rate as the reporting school tuition organizations (shown in Table 6, Scenario 2). However, it seems likely that the non-reporting school tuition organizations, which are generally smaller and have less capacity to reach out to students, would award fewer scholarships to public school students. Scenario 3 assumes that the non-reporting school tuition organizations were half as

likely to provide scholarships to public school students.

> *Taken together, the school tuition organizations estimate that 1,810 of their scholarship recipients transferred from public to private school as a result of receiving scholarships. These transfers saved the state $8.5 million.*

Additionally, given that most school tuition organizations award scholarships based on financial need, it is likely that a portion of students who previously attended private school might have had to return to the public system due to financial considerations. As a general principle, consumers are sensitive to changes in price. When the price of a good goes up, some of those who used to purchase that good will decide that it is not worth the additional charge. The sensitivity of consumers to a change in price is known as the price elasticity of demand. The most thorough analysis of the price elasticity of demand for private schools was done by Barry R. Chiswick and Stella Koutroumanes.[13] They determined that the elasticity of demand was -.48, which means that a tuition increase of 10 percent results in a 4.8 percent decrease in demand.

The average tuition cost of a U.S. private school was $4,689 in 19992000.[14] The average scholarship awarded by a school tuition organization is over $1,000. Assuming that Arizona's private school tuition costs are near the average, the scholarships cover roughly 20 percent of the total tuition cost.

This suggests that if the scholarships were eliminated, demand among those who experienced that change in price would fall by roughly 10 percent.

Yet, there is reason to expect that this might understate the impact of eliminating the scholarships. Survey responses suggest that scholarships awarded to the most financially needy are larger than average. Also, lower-income scholarship recipients are likely more sensitive to a change in price than the average person.

However, in order to be conservative, the calculation used to derive Scenario 4 assumes an additional 10 percent of all scholarships were used by those who would otherwise have had to return to public school in absence of the program. Scenario 4 builds on the assumptions in Scenario 3, which assumes that the non-reporting school tuition organizations are half as likely as the reporting school tuition organizations to award scholarships to a student transferring from public school.

These calculations suggest that the total cost of the program, accounting for savings from students who would otherwise be enrolled in public school, was roughly $7.5 million in 2002.

While the cost of the program is relatively small, this cost estimate is higher than the 2001 Cato Institute study projection. It appears that scholarships are reaching fewer former public school students than previously expected.

This could be caused by a number of factors. There may be enough demand and perceived need for financial relief among the existing private school community to consume most of the resources of the school tuition organizations. Additionally, many school tuition organizations are associated with existing private schools. Those school tuition organizations likely focus on meeting the needs of current private school families first. School tuition organizations may also have difficulty raising awareness about the availability of scholarships among public school students most likely to meet the financial eligibility requirements.

Table 6. Impact of Scholarship Tax Credit on Arizona Budget

	Estimated number of scholarships used by new private school students	Revenue loss, 2002 ($ millions)	Savings, 2002-03 ($ millions)	Net Loss ($ millions)
SCENARIO 1 Estimates provided by school tuition organizations	1,810	26.2	8.5	17.7
SCENARIO 2 Assuming same portion for all school tuition organizations	2,719	26.2	12.8	13.4
SCENARIO 3 Assuming non-reporting school tuition organizations are half as likely	2,263	26.2	10.7	15.5
SCENARIO 4 An additional 10% of all scholarships	3,974	26.2	18.7	7.5

These calculations suggest that the total cost of the program, accounting for savings from students who would otherwise be enrolled in public school, was roughly $7.5 million in 2002.

Although there is no publicly available data on tuition in Arizona private schools, it is possible that some schools have raised tuition as a result of the availability of scholarship money. An increase in tuition may be entirely justified. National data indicate that most private schools charge less per-pupil than public schools. Likewise, a survey of Arizona private schools performed for the 2001 Cato Institute study also indicated that most Arizona private schools charged significantly less.[15] Regardless of the reasons for a rise in private school tuition, such a rise would offset some of the scholarship program's benefits, such as facilitating the transfer of students from public school, and it would help explain why fewer than expected transferring students are using scholarships.

As the program expands and school tuition organizations receive more contributions, it seems likely that the number of scholarships allocated to transferring students will increase.

As the program expands and school tuition organizations receive more contributions, it seems likely that the number of scholarships allocated to transferring students will increase. Arizona has roughly 44,000 private school students. More than

19,000 students received scholarships in 2002, which means that roughly 43 percent of all private school students received some tuition assistance through the scholarship tax credit program.

Assuming that the total amount contributed grows at the rate of 5.7 percent per year, the same rate that it grew between 2001 and 2002, in five years, school tuition organizations will receive $34.6 million. As required by law, 90 percent of those contributions will be distributed as scholarships, for a total of $31.2 million distributed in 2007. If the average scholarship amount remains the same, then there would be 28,347 scholarships available in 2007.

Table 7. Projected Contributions to and Distributions by School Tuition Organizations

Year	Total Donated ($)	Amount Distributed ($)	Total Scholarships	Transfers Required to Break Even
2002	26,254,763	23,629,287	21,481	5,568
2003	27,752,247	24,977,022	22,706	5,886
2004	29,335,142	26,401,628	24,001	6,222
2005	31,008,320	27,907,488	25,370	6,577
2006	32,776,931	29,499,238	26,817	6,952
2007	34,646,417	31,181,776	28,347	7,348

For the state to break even, the amount saved by transferring students must fully offset the revenue forgone by use of the tax credit. In 2007, the state would break even when 7,348 scholarships are

granted to students who otherwise would have attended public school. Currently, between 2,000 and 4,000 scholarships, or 10 and 20 percent of all scholarships, are used by transferring students. To break even, an extra 3,400 to 5,400 scholarships would need to be awarded to transferring students. This means that as much as half of the additional scholarships raised as a result of the growth in participation would have to be awarded to transferring students.

It seems likely that most of the need among those already enrolled in private schools is being met. It is thus reasonable to expect that a greater portion of the next $1 million raised by school tuition organizations would be granted to transferring students. Therefore, as participation in the program increases, it is probable that program costs will decrease, and eventually the savings generated will outweigh the costs.

Of course, it is also likely that the value of the scholarships will increase, especially if a larger portion of scholarships goes to those who want to switch from public to private school, but find the tuition prohibitive. However, these calculations suggest that the program is not a significant drain on the state budget. Further, it is likely to become less expensive and may eventually save the state money.

Findings and Reforms for Consideration

The data compiled in this study lead to several conclusions about the effects of the tuition tax credit and suggest several modifications that could improve the program. Each of these policy options has tradeoffs. The following is a discussion of both the potential benefits and drawbacks of a variety of reforms for policymakers to consider.

> *Currently, between 2,000 and 4,000 scholarships, or 10 and 20 percent of total scholarships, are used by transferring students. To break even, an extra 3,400 to 5,400 scholarships would need to be awarded to transferring students.*

Improve Transparency through Additional Reporting Requirements

The greatest difficulty in effectively analyzing the scholarship tax credit program is the dearth of reliable, comprehensive information about the program. For example, the Department of Revenue collects information provided by school tuition organizations, but those organizations are not required to provide comprehensive information detailing exactly how much has been donated and how that money has been used.

As previously noted, a new law will require school tuition organizations to provide much of this information. To ensure the accuracy of the

information, school tuition organizations could also be required to undergo financial audits by independent auditing firms. Policymakers could consider setting a threshold so that those requirements only apply to organizations with budgets greater than a set amount. For example, organizations with revenues exceeding $250,000 could be required to undergo a full financial audit.[16] Also, a deadline for completion and submission to the Department of Revenue should be set.

The drawback to this proposal is that complying with such requirements consumes resources from the school tuition organizations that might otherwise help students receive a better education.

> *All families sending their children to private schools pay taxes to support public schools. Reducing the financial burden on those families is a fair and reasonable policy goal.*

Implement More Options for Low-Income Students in Public Schools

Most scholarships are used by students who were already enrolled in private school. Yet it would be a mischaracterization of the program to suggest that those in private schools are necessarily wealthy. In fact, according to the National Center for Education Statistics, nearly half of all private schools teach students who are eligible for the free or reduced-price school lunch program, and more than 10 percent of all private school students were eligible

for the free or reduced-price lunch program.[17] That is a lower portion than public schools. Almost all public schools have some eligible students and 42.5 percent of all public students are eligible for the free or reduced-price lunch program. However, the National Center for Education Statistics suggests that 4,400 Arizona students in private schools (roughly 10 percent) were eligible for the free or reduced-price lunch program. Those students are the most likely beneficiaries of the tax credit scholarship.

In addition, all families sending their children to private schools pay taxes to support public schools. Reducing the financial burden on those families is a fair and reasonable policy goal.

As the program matures and more taxpayers become aware of the opportunity to donate to school tuition organizations, it is likely that more scholarships will be made available to those currently attending public school. In the initial stage of the program, it makes sense that those closest to the private schools – parents with children already attending private school – would be the most aware of the opportunity both to contribute to and apply for scholarships.

Policymakers concerned that the program is not adequately providing school choice to those unable to afford private school tuition should consider ways to expand the program. Such options include adoption of a corporate scholarship tax credit and implementation of additional school choice initiatives that

target students currently attending public school, but who would prefer a private option.[18]

Policymakers could also consider reforming the existing program so that a portion of scholarship funds is directed to students below a given income threshold. This reform is typically referred to as "means testing."

One of the strengths of the scholarship tax credit is that it puts power in the hands of individuals to allocate resources instead of giving all control to the state. Mandated means testing takes discretion away from school tuition organizations and donors. Donors may wish to provide scholarships for students who exhibit exceptional merit, are handicapped, or are enrolling in a particular type of learning environment. Donors are ultimately responsible for ensuring that their contributions are put to the best use. If donors believe that a greater portion of the scholarship money should go to financially needy students, they should contribute to organizations that explicitly pursue that mission.

Other states, however, require means testing so that only students from low-income families receive scholarships. For example, both Pennsylvania and Florida have created scholarship tax credits and require that scholarship recipients come from families below a certain income threshold. In Florida, Corporate Tax Credit Scholarship recipient eligibility is restricted to those students in families qualifying for the federal free and reduced-price school lunch program, or 185 percent of the poverty

line.[19] Pennsylvania uses the much more generous threshold of a household income of $50,000 plus $10,000 per eligible child.[20]

The benefit of means testing is that it ensures scholarship money is directed solely to lower-income families, who would likely increase the number of students transferring from public to private schools. However, using poverty as the sole standard for distributing scholarships excludes other deserving children, such as middle-income students. Means testing also overlooks other admirable criteria, such as academic merit, and ultimately limits taxpayers' discretion over the allocation of their charitable contributions.

Encourage More Student Transfers to Reduce Budget Impact

Even though most scholarship recipients were already attending private school, a considerable number of scholarships are used by those who were either previously attending public school or who may have otherwise had to switch to public school due to financial considerations. Therefore, the tax credit's impact on the state budget may be as low as $7.5 million.

> *Because the average cost of private school tuition is less than the per-pupil expenditure in public schools, a well-designed school choice program actually saves taxpayers money.*

If policymakers are concerned about the budget, they should consider methods of expanding the existing tax credit or implementing additional initiatives that would encourage families with children in public school to consider a private option. Simply eliminating this program would take away the opportunity for many families to send their children to schools of their choice.

Because the average cost of private school tuition is less than the per-pupil expenditure in public schools, a well-designed school choice program actually saves taxpayers money. For instance, a program that provided $2,500 toward the cost of private school – more than half the average tuition -- would still result in taxpayer savings of more than $2,000 for each student who uses the program to leave the public school system.

Eliminate Scholarship Recipient Recommendations

Among the changes policymakers should consider is elimination of the option for donors to recommend scholarship recipients. Northern Arizona University professor of accounting and Flagstaff Christian Scholarship Fund president Lawrence C. Mohrweis notes that "nonprofit organizations that accept contributions with the understanding that donor-directed recommendations will be followed are providing quid pro quo functions. The process of collecting contributions and the process of allocating scholarships should be independent of one another."[21]

Individual donors are the best way to ensure that charitable organizations are not misusing their contributions. If they do not believe salary and overhead costs are merited, then donors should not give to the charity.

It is already illegal for charities to serve as quid pro quo facilitators through which donors direct money to friends or receive compensation in return. There may be no instances of school tuition organizations breaching this norm. Donors who recommend students may simply be attempting to make an organization aware of a needy or particularly outstanding candidate for a scholarship. However, the practice suggests the potential for a quid pro quo relationship and may lead to a less than optimal use of school tuition organization funds.

Prevent Abuse of the 10 Percent Rule

Mohrweis also cites the potential for abuse of the provision that allows school tuition organizations to use up to 10 percent of receipts for administrative expenses. Ideally, this provision would ensure that school tuition organizations can to reach out to potential scholarship recipients and donors. However, it could also be used to provide overly generous payments to employees.[22]

Yet policymakers need not impose additional regulations on this practice. Individual donors are the best way to ensure that charitable organizations

are not misusing their contributions. Donors ought to consider whether compensation of school tuition organization executives and staff is reasonable. If they do not believe salary and overhead costs are merited, then donors should not give to the charity.

Most directors of school tuition organizations are charitable individuals who sacrifice their time with little or no compensation to help students receive a better education. Of the 18 school tuition organizations that responded to the survey, only eight had paid employees, and only one had more than one full-time employee.

Eliminating the provision entirely would likely backfire, making it difficult for most school tuition organizations to function. It would have the unintended consequence of reducing awareness of the program among the very constituency the program is designed to help: low-income families unable to afford private school.

Policymakers concerned about potential abuse of the 10 percent rule should consider ways to maximize transparency so donors can make informed decisions about which school tuition organizations should receive their contributions. One way to improve transparency would be to require the Arizona Department of Revenue to honor requests from school tuition organizations to post their financial information so donors could review salary, overhead, and other related administrative expenditures.

This practice has several advantages over regulations, expenditure caps, or an outright ban on the 10 percent rule. First, such transparency encourages school tuition organizations to limit non-scholarship expenditures, without jeopardizing the financial solvency of smaller organizations. Next, posting financial information through the Department of Revenue at the request of school tuition organizations encourages best practices and rewards organizations that follow them with greater publicity. Further, requiring the Department of Revenue to post financial information reassures potential donors of the quality and accuracy of the information. Also, the Department's website would serve as a convenient, one-stop resource for donors.

The practice of making financial information available through the Department of Revenue at the request of school tuition organizations empowers donors to decide which organizations are worthy of their support. School tuition organizations may choose not to post this information, but they would lose a valuable vehicle for reaching potential donors. In addition, existing donors would be free to question why a school tuition organization did not disclose important financial information.

Conclusion

Since the Arizona scholarship tax credit became available in 1998, the rate of growth in donations and taxpayer participation has exceeded by more than $4 million the "high-growth" scenario projected in the original 2001 Cato study. In 2002, one out of

every 20 taxpayers with an income tax liability of more than $500 donated to the tuition tax credit program. Further, between 2001 and 2002, the total amount of contributions grew by nearly six percent. This growth is especially noteworthy given the economic downturn in 2001.

> *The practice of making financial information available through the Department of Revenue at the request of school tuition organizations empowers donors to decide which organizations are worthy of their support.*

The tax credit has generated significant resources that enable students to attend private schools of their choice. As of 2002, school tuition organizations had raised more than $84 million for scholarships. Most scholarships are awarded based on financial need, but are used by students who were already enrolled in private school. There is a wide variety of school tuition organizations that collect and distribute scholarship money, but a few large organizations account for the majority of scholarships.

One challenge to accurately assessing the effectiveness of the scholarship tax credit program is the lack of reliable information. But new reporting requirements for 2003 will give researchers a better understanding of the program's effectiveness beginning in 2004.

Despite the lack of information, it can be estimated that the total revenue loss to the state, after accounting for savings from the reduced number of public school students, was roughly $7.5 million in 2002. The state's fiscal year 2005 budget is an estimated $6.1 billion, so the program cost amounts to roughly one-tenth of one percent of the state's general fund revenues.23 Given the program's strong and steady growth, it appears taxpayers are convinced that the benefits of the tuition tax credit program outweigh its cost.

> *Overall, this experiment in market education should be allowed to continue. The program is helping families afford private school, and it has the potential to help more families at little or no cost to Arizona taxpayers.*

As donations increase, it is reasonable to expect that a greater portion of scholarships will go to students newly transferring from public school to private school. Therefore, future savings are likely to fully offset any revenue loss, saving taxpayers money.

Arizona policymakers concerned about the state's budget problems should consider expanding the program and adopting other initiatives to make it easier for students currently in public schools to transfer to private schools. Such reforms would reduce public education's strain on the state budget.

Overall, this experiment in market education should be allowed to continue. The tax credit has a growing level of public support, demonstrated both by the high level of taxpayer participation and the number of organizations created to participate in the program. The program is helping families afford private school, and it has the potential to help more families at little or no cost to Arizona taxpayers.

NOTES

1. The Joint Legislative Budget Committee (JLBC) estimates the FY 2005 shortfall will be $960 million. See *FY 2005 Budget Update,* October 21, 2003, http://www.azleg.state.az.us/jlbc/powerpt/powerpt17/sld026.htm.

2. Income Tax Research Committee, "An Examination of Personal Income Tax Credits," Report to the Citizens' Finance Review Commission, August 22, 2003, http://www.azcfrc.az.gov/files/Personal%20Tax%20Credits%20with %20cover--final.pdf.

3. Glen Wilson, "The Equity Impact of Arizona's Education Tax Credit Program: A Review of the First Three Years (1998-2000)," Arizona State University Education Policy Studies Laboratory, March 2002, 19, http://www.asu.edu/educ/epsl/EPRU/documents/EPRU%202002-110/epru-0203-110.htm.

4. In a Goldwater Institute survey, each school tuition organization was asked if anyone from their organization had been contacted by Arizona State University's Education Policy Studies Laboratory. None of the organizations that responded to the survey had been contacted.

5. Carrie Lips and Jennifer Jacoby, "The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money," Cato Institute Policy Analysis no. 414, September 17, 2001.

6. State of Arizona, House of Representatives, Forty-sixth Legislature, First Regular Session, 2003, Chapter 169, House Bill 2396, http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/legtext/46leg/1r/laws/0169.htm.

7. Stephen Broughman and Lenore Colaciello, *Private School Universe Survey, 1999-2000,* U.S. Department of Education, National Center for Education Statistics, August 2001, 1, http://nces.ed.gov/pubs2001/2001330.pdf.

8. Thomas D. Snyder and Charlene M. Hoffman, "Private elementary and secondary enrollment and schools, by amount of tuition, level, and orientation of school: 1999-2000," Table 61 in *Digest of Education Statistics 2002,* U.S. Department of Education, National Center for Education Statistics, June 2003, http://nces.ed.gov/pubs2003/digest02/tables/PDF/table61.pdf.

9. Arizona School Choice Trust, "Board & Friends Update," August 1, 2003, vol. 1, no. 8.

10. Frank Johnson, "Revenues and Expenditures by Public School Districts: School Year 1999-2000," *Statistics in Brief*, U.S. Department of Education, National Center for Education Statistics, June 2003, http://nces.ed.gov/pubs2003/2003407.pdf.

11. Wilson, "Arizona's Education Tax Credit Program."

12. "School Modernization Facts: Arizona," National Education Association, Legislative Action Center, October 11, 2002, http://www.nea.org/lac/modfacts/AZfacts.html.

13. Barry R. Chiswick and Stella Koutroumanes, "An Econometric Analysis of the Demand for Private Schooling," *Research in Labor Economics* 15 (1996): 209-37.

14. Snyder and Hoffman, "Private elementary and secondary enrollment" Table 61.

15. Lips and Jacoby, "Arizona Scholarship Tax Credit," 10.

16. In response to a query from Goldwater Institute education analyst Vicki Murray, on October 27, 2003, Dr. Lawrence C. Mohrweis, Northern Arizona University professor of accounting and Flagstaff Christian Scholarship Fund president, explained that a financial review would provide very little

assurances, because a CPA would not even study or evaluate an entity's internal controls. For the distinction between "financial audit" and "financial review," see William F. Messier, Jr., *Auditing & Assurance Services: A Systematic Approach*, 3rd ed. (Boston: McGraw-Hill/Irwin, 2003). "A review is defined as the performance of inquiry and analytical procedures that provide the accountant with a reasonable basis for expressing limited assurance that no material modifications should be made to the statements in order for them to conform to generally accepted accounting principles or another comprehensive basis of accounting," 766. In contrast, "A financial statement audit determines whether the overall financial statements present fairly in accordance with specified criteria. This type of audit usually covers the basic set of financial statements (balance sheet, income statement, statement of stockholders' equity, and a statement of cash flows), and generally accepted accounting principles (GAAP) serve as the criteria," 15.

17. Martha Naomi Alt and Katharin Peter, "Percentage of schools that had any students eligible for free or reduced-price lunches and, in participating schools, the average percentage of students who were eligible, by sector and private school type: 1999-2000," Table 6 in *Special Analysis 2002-Private Schools: A Brief Portrait*, U.S. Department of Education, National Center for Education Statistics, August 2002, http://www.nces.ed.gov/programs/coe/2002/analyses/private/tables/tab06.asp.

18. Darcy Olsen, "Education Scholarships: Expanding Opportunities for Students, Saving Taxpayers Money," Goldwater Institute, Arizona Issue Analysis no. 169, March 26, 2002, http://www.goldwaterinstitute.org/pdf/materials/18.pdf.

19. "Increase the Current Limits on Corporate Tax Credits for Scholarships Program to Help Alleviate the Fiscal Burden on Amendment 9 Class-Size Reduction Requirements," *Florida Tax Watch*, Research Report, February 2003, http://www.helpflordakids.org/pdf/TaxWatchReport.pdf.

20. "Education Tax Credit Summary," Reach Foundation, November 10, 2003, http://www.paschoolchoice.org/reach/lib/reach/edutaxcreditssummary.pdf.

21. Lawrence C. Mohrweis, "Private School Tax Credits," *AZ CPA*, July/August 2002, 8.

22. Ibid., 10.

23. JLBC, "FY 2004 General Fund Revenue," *FY 2005 Budget Update*, October 21, 2003, http://www.azleg.state.az.us/jlbc/powerpt/powerpt17/sld002.htm. The JLBC estimates the FY 2005 shortfall will be $960 million, see http://www.azleg.state.az.us/jlbc/powerpt/powerpt17/sld026.htm. The current cost of the tuition tax credit program is less than one percent (.78 percent) of this amount. This percentage does not include an adjustment for the cost of students transferring back into the public school system.

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No. 05-15754

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M WINN, an Arizona taxpayer, et al , Plaintiffs-Appellants, v. GALE GARRIOTT, in his official Capacity as Director of the Arizona Department of Revenue, et al., Defendants-Appellees.	Appeal from the United States District Court District of Arizona No. CIV-00-0287-PHX-EHC

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ADDENDUM C
Department of Revenue Private School Tuition Organization Report for 1998

ARIZONA'S INDIVIDUAL INCOME TAX CREDITS FOR SCHOOLS

FINAL REPORT OF 1998 CREDITS

ARIZONA DEPARTMENT OF REVENUE

OFFICE OF ECONOMIC RESEARCH AND ANALYSIS

OCTOBER 2000

ARIZONA'S INDIVIDUAL INCOME TAX CREDITS FOR SCHOOLS

In Arizona's first regular legislative session in 1997, House Bill 2074 was passed and signed into law. This bill created a private school tuition organization individual income tax credit and a public school extra curricular activity fee individual income tax credit. These credits were effective for taxable years beginning from and after December 31, 1997. Returns filed in calendar year 1999 for tax year 1998 were the first opportunity for taxpayers to claim these credits.

Also contained in House Bill 2074 was session law requiring the Arizona Department of Revenue (ADOR) to report on the fiscal impact of the private school tuition organization credit on July 1, 1999. An

earlier version of this report, in fulfillment of that requirement, contained information on the fiscal impact of both school tax credits as reported on returns filed through April 1999. This report updates that data for returns filed through December 1999. Also included is information on revenues received from taxpayers (with the intent of claiming the credits) provided by private school tuition organizations and public schools.

Retrieval of the data from the individual income tax returns is a prohibitive task. Information reported on credit forms can only be examined by reviewing individual returns. As can be seen from the data presented below, more than 40,000 tax returns were reviewed to obtain the data presented.

As with any program, the first year of participation is not necessarily indicative of the level of participation in the future. This is particularly true with the private school tuition organization credit because of the challenge to this credit filed with the Arizona Supreme Court that was pending throughout all of calendar year 1998. (The decision was returned in January 1999, upholding the credit. The United States Supreme Court declined to review the case.) Not only was there apprehension on the part of the public as to whether or not this credit would be upheld, but many tuition organizations did not actively solicit contributions because of the uncertainty. Therefore, the statistics presented here may not be representative of the tax returns that are filed in 2000 for tax year 1999.

PRIVATE SCHOOL TUITION ORGANIZATION TAX CREDIT

An individual income tax credit is allowed in the amount of voluntary cash contributions made by a taxpayer to a school tuition organization (STO), not to exceed $500 in a taxable year. The STO is defined in statute as a 501(c)(3) organization that allocates at least 90% of its annual revenue for scholarships allowing children to attend a qualified private school (kindergarten through twelfth grade) of their parents' choice.[1]

ADOR has asked that STOs submit a report listing donors and donation amounts. Sixteen STOs contacted ADOR in 1999; an additional 18 STOs made their presence known in 2000. These are listed below, with the 1999 STOs italicized.

Arizona Adventist Scholarships, Inc.
Arizona Christian School Tuition Organization (a.k.a. East Valley Christian School Tuition Organization)
Arizona Episcopal Schools Foundation
Arizona Independent Schools Scholarship Foundation (a.k.a. St. Gregory/Green Fields Scholarship Foundation)
Arizona Native Scholastic Enrichment and Resources
Arizona Private Education Scholarship Fund, Inc.

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[1] A.R.S. § 43-1089. This statute was amended by 2000 legislation, which added preschools for handicapped children to the definition of qualified private school.

Arizona Scholarship Fund
Arizona Scholarship &Tuition, Inc.[2]
Arizona Scholarships &Grants Organization
Arizona School Choice Trust
Brophy Community Foundation
Catholic Tuition Organization of the Diocese of Phoenix
Catholic Tuition Support Organization of the Diocese of Tucson
Chedar Scholarship Organization, Inc.
Christian Scholarship Fund ofArizona
Educare
Florence Englehardt/Pappas Scholarship Foundation
Foundation for Montessori Scholarships
Higher Education for Lutherans Program Foundation
Institute for Better Education
Jewish Community Day School Scholarship Fund
Lutheran Education Foundation, Inc.
Maranatha Christian Co-Op Tuition Fund
Montessori School Tuition Organization
Northern Arizona Christian School Scholarship Fund
The Orme Group
Patagonia Scholarship Fund
Prescott Christian School Scholarship Foundation
School Tuition Association of Yuma, Inc.
School with Heart Foundation
Southern Arizona Foundation for Education
TesseracT Tuition Organization

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[2] This STO ceased to operate in 2000.

VVBC Christian Education Fund
Walter T. Beamis Scholarship Foundation

One STO listed above, Arizona Scholarships & Grants Organization, was not actively soliciting donations in calendar year 1998. The fifteen STOs active in 1998 reported the following donations for 1998 in 1999:

STO	# of donations reported	$ received	# of donations claimed on returns
Arizona Christian School Tuition Org	1,197	$538,611	1,035
Arizona Independent Schools Scholarship Foundation (St. Gregory/Green Fields)	78	$32,480	62
Arizona Scholarship Fund	18	$6,900	16
Arizona Scholarship & Tuition, Inc.	51	$23,075	48
Arizona School Choice Trust	27	$9,525	23

STO	# of donations reported	$ received	# of donations claimed on returns
Brophy Community Foundation	392	$163,603	301
Catholic Tuition Org of the Diocese of Phx	1,988	$837,140	1,694
Christian Scholarship Fund of Arizona	170	$72,235	137
Higher Education for Lutherans Program	78	$32,355	69
Institute for Better Education	57	$24,570	45
Lutheran Education Foundation	1	$100	1
Maranatha Christian Co-Op Tuition Fund	4	$1,455	0
Northern Arizona Christian School Schol.	100	$38,700	84

STO	# of donations reported	$ received	# of donations claimed on returns
Southern Arizona Foundation for Education	58	$22,250	38
Tesseract Tuition Organization	28	$13,300	23
	4,247	$1,816,299	3,576

In some instances, taxpayers donated more than $500 to the STOs. For purposes of these reports, amounts over $500 were not included in the total donations.

Due to the court challenge that overshadowed the private school tuition organization tax credit throughout 1998, many of these STOs were hesitant to distribute their revenues for scholarships. Those that did distribute some or all of their revenues are listed in the following table, showing the number of scholarships and amount by school for which the scholarship was provided. (The Institute for Better Education did not provide the number of scholarships by school.)

STO	Receiving School	City	#	$
Arizona Scholarships & Tuition	Heritage Southwest School	Scottsdale	29	$21,025
	Haven Elementary School	Scottsdale	13	$5,335
Higher Education for Lutherans Program	Arizona Lutheran Academy	Phoenix	41	$14,380
	Emmaus Lutheran School	Phoenix	26	$4,150
	Emmanuel Lutheran School	Tempe	24	$7,475
	Good Shepherd Lutheran School	Phoenix	20	$3,025
	Mt. Calvary Lutheran School	Flagstaff	2	$1,800
	Peridot Lutheran School	Peridot	2	$50
	Redeemer Lutheran School	Tucson	1	$500
Institute for Better Education	Adademy High	Tucson		$500
	Desert Christian High School	Tucson		$17,930
	Enchanted Desert School	Tucson		$500
	Fountain of Lafe Lutheran	Tucson		$250
	Salpointe Catholic School	Tucson		$500
	Tucson World of Education	Tucson		$500
Northern AZ Christian School Scholarship	SonRise Christian School	Flagstaff	15	$17,500
	Sedona Christian School	Sedona	15	$17,500
St Gregory/Green F Fields Scholarship	St Gregory College Prep	Tucson	60	$23,960
	Green Fields Country Day	Tucson	22	$8,520
Southern Arizona Foundation for	Faith Lutheran School	Tucson	22	$8,900
	Fountain of Life Lutheran	Tucson	11	$4,850

STO	Receiving School	City	#	$
Education	Lutheran Church of Ascension	Tucson	18	$7,050
	Messiah Lutheran	Tucson	5	$1,450
				$167,650

For actual individual income tax returns, the following summary statistics have been compiled. A total of 6,488 returns appeared on the list of returns on which the private school tuition organization credit number was recorded on the front of the return.

- 1,941 of these (29.9%) were actually public school extra curricular activity tax credits. The wrong credit number was written on the front of the return.
- 18 of these were actually TANF employment credits. The wrong credit number was written on the front of the return.
- 8 of these were actually credits for taxes paid to other states or countries. Again, the wrong credit number was written on the front of the return.
- 67 of the claims were not claims at all or were duplicates. In the first instance, the credit number was written on the front of the return in error. The duplicates were a result of amended returns and were removed from the database.
- 59 credits were claimed for donations to known STOs. However, the names of the taxpayers claiming the credits did not appear on the corresponding list provided by the STO. These were included in the summary tables.
- 524 credits did not have adequate documentation attached for review. This may be due to employee

error (the required pages of the return were not copied) or due to taxpayer error (the required credit forms were not submitted).

- 382 returns were most likely or definitely invalid credit claims, totaling $155,949. Examples of invalid claims would be money provided to Arizona State University, Northern Arizona University, Glendale Community College or Pima Community College. There were also instances where it appeared that taxpayers were claiming this credit for actual tuition paid to a private school.
- 3,489 of the 6,488 (53.8%) were verified against STO-provided donor lists.

Credit created by these 3,548 returns (3,489 verified claims plus 59 unverified) totaled $1,570,600. Credit actually used by these returns totaled $1,535,051. (For some taxpayers, credit established exceeded tax liability, thus creating a carryforward credit for future tax years.)

Table 1, attached to this report, provides some figures describing the 3,548 private school tuition organization credits claimed. Breaking the credit claimants into groups by Federal Adjusted Gross Income (FAGI) shows that the largest group of claimants (20.5%) fall into the $50,000 to $75,000 group. This group claimed $320,695 of the $1,571,100 total, or 20.4%. Total credit used, as mentioned above, is the amount of credit that could actually be used to offset tax liability. Since this credit is not refundable, any "leftover" credit can be

carried forward into future tax years (up to five future tax years).

The column titled "Credit Used As A % of Tax Liability" shows the percentage of tax liability that the taxpayers were able to offset by providing revenue to STOs. For the lowest income group, $25,000 or less, 88.5% of their original tax liability (before the credit is applied) was offset by their donation.

Tables 3 and 4 present comparative figures for the private school tuition organizations for calendar year 1998 and 1999. There was a significant increase in activity in 1999, nearly $14 million was donated in 1999 compared to under $2 million in 1998. Additionally, there was a large increase in scholarships paid out by the school tuition organizations.

PUBLIC SCHOOL EXTRA CURRICULAR ACTIVITY FEE TAX CREDIT

An individual income tax credit is allowed in the amount of fees paid to a public school (kindergarten through twelfth grade) in support of extra curricular activities, not to exceed $200 in a taxable year[3]. While extra curricular activities are suggested in the statute to include band uniforms, equipment for varsity athletic activities, or scientific laboratory

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[3] A.R.S. § 43-1089.01. This statute was amended by 2000 legislation, which allows credit for "cash contributions" in additions to fees paid and allows the money to also be used for character education.

materials, each school is required to determine which activities qualify at that institution.

The ADOR has asked, for purposes of verification, that public schools submit a report listing donors and donation amounts. Requests for the information were sent out to about 370 public school districts and charter schools, as identified through the Arizona Department of Education. At this timer sixty charter schools/districts have failed to provide complete information, as set out below. (The bold names are public school districts; the remaining schools are charter schools.)

Academy With Community Partners
Alternative Learning Center
American Grade Schools
AZ Career Academy
Bagdad Unified School Dist
Call-A-Teen Center for Excellence
Casa Grande Union High School Dist
Center for Academic Success
Challenge Charter School
Chester Newton Charter School
Mingus Springs Charter School
Montessori Schoolhouse
Morenci Unified School Dist
New Horizon Charter School
Northland Preparatory Academy
Owens Elementary School Dist
Paramount Life Preparatory Academy
PCAE-Edge Charter School
Prescott Unified School Dist[4]
Presidio School

[4] Two of nine schools in the Prescott Unified School District have not reported.

Chevelon Butte Elementary School Dist
D.W. Higgins Institute
Destiny Advanced Learning Center
Downtown Community Charter School
Eagle Elementary School Dist
Eloy Elementary School Dist[5]
Esperanza Montessori Academy
Flagstaff Unified School Dist[6]
Fort Thomas Unified School Dist
Future Develop & Performing Art
GRADE
Gila Crossing Charter
Greyhills Academy
Hillside Elementary School Dist
Kayenta Unified School Dist
Kyrene Elementary School Dist[7]
San Fernando Elementary School Dist
Sequoia School
Shonto Charter School
Shonto Preparatory Tech High School
Skull Valley Elementary School Dist
Teen Choice Leadership
Tesseract Charter School
The Village
Tol-chit'kooh Charter School
Topock Elementary School Dist
Touchstone Community Charter School
Vechij Himdag Alternative School
Ventana Academic School
Victory High School
Vision Quest Academy
Walnut Grove Elementary School Dist
Wellton Elementary

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[5] Three of four schools in the Eloy Elementary School District have not reported.

[6] Thirteen of nineteen schools in the Flagstaff Unified School District have not reported.

Life Enrichment Community Schools
Life School College
Little Singer Charter School
Los Milagros Academy
McCray Academy
School Dist
Westland School
Window Rock Unified School Dist

Appendix 1 provides a comparison of the amounts reported by the schools, with amounts reported by taxpayers. The schools reported receiving $8.95 million in fees during 1998. The taxpayer information reflects the total contribution made to the schools, regardless of the taxpayer ability to use the whole amount as a credit. The "% verified" column reflects the percentage of returns where the information provided by the taxpayer could be verified by matching it with information provided by the schools. Lack of verification could be the result of several factors, and does not indicate a problem with the credit claimed. Many school districts filed handwritten reports or reports that contained little information that could be used to match donors against those taking credits.

For actual individual income tax returns processed through the end of December 1999r the following summary statistics have been compiled. A total of 39r211 returns were filed on which the Public School Extra Curricular Activity Fee credit number was written on the front of the return, or was originally misfiled as a STO credit.

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[7] Three of twenty-three schools in the Kyrene Elementary School District have not reported.

- 39,211 returns have been reviewed.
- 23 were found to be TANF credits.
- 70 were found to be STO credits.
- 5 were found to be other credits.
- 160 were found to be invalid because they reflected payments to a community college, university or private school, or were ineligible for another reason. Some of these may be found valid after further review.
- 2,434 taxpayers failed to file the proper forms, or filed incomplete forms.
- 40 taxpayers actually claimed no credit.
- For the remaining 36,479 returns, taxpayers used $6.5 million in credits. For some taxpayers, credit established exceeded tax liability, creating a carryforward for future tax years. The carryforward calculated here is $151,499.

Table 2, attached to this report, provides a different look at the taxpayer-reported information. Breaking the credit claimants into groups of FAGI shows that the largest group of claimants (25.4%) fall into the $50,000 to $75,000 group. This group claimed $1,655,944 of the $6,502,767 claimed or 25.5%.[8] Total credit used, as mentioned above, is the amount of credit that could actually be used to offset tax liability. Since this credit is not refundable, any

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[8] The difference in taxpayer count and credit total between Table 2 and Appendix 1 results from taxpayers that provided revenue to more than one school and those that gave more than the $200 credit maximum. Table 2 counts taxpayers only once and caps their contribution amount at $200. Appendix 1 counts the taxpayer for each school for which a contribution was made and for the total amount made, even if it was greater than the $200 credit limit.

"leftover" credit can be carried forward into future tax years (up to five future tax years).

The column titled "Credit Used As A % of Tax Liability" shows the percentage of tax liability that the taxpayers were able to offset by providing revenue to Public Schools. For the lowest income group, $25,000 or less, 48.2% of their original tax liability (before the credit is applied) was offset by their donation.

SUMMARY

The STOs (which have provided information to ADOR) reported contributions of $1.8 million; ADOR has received credit claims of $1.6 million. Public schools reported almost $9 million in revenues received for the public school credit; tax returns that have been reviewed show public school credits totaling $6.6 million. For 1999, the STO's reported contributions of $13.7 million and the public schools reported receiving $14.6 million, raising the potential impact from $8.2 million to $28.3 million in a one year period. Claims in future years are not expected to increase so dramatically. However, the number of school tuition organizations doubled in the past year, which greatly increases the number of taxpayers which are exposed to the credit.

TABLE 1
PRIVATE SCHOOL TUITION ORGANIZATION CREDITS
BY SIZE OF FEDERAL ADJUSTED GROSS INCOME

FAGI	#	% of total	Total Credit	% of total	Total Credit Used	Credit Used As A % of Tax Liability	Credit Carried Forward	% of Claims Verified
$25,000 or less	144	4.1%	$42,116	2.6%	$26,133	88.5%	$15,983	97.2%
$25,000 to $50,000	538	15.2%	$207,539	13.2%	$191,776	61.7%	$15,763	98.3%
$50,000 to $75,000	727	20.5%	$320,695	20.4%	$318,134	38.4%	$2,561	98.6%
$75,000 to $100,000	587	16.5%	$268,290	17.1%	$268,151	25.4%	$139	98.0%
$100,000 to $150,000	660	18.6%	$305,860	19.5%	$304,757	16.7%	$1,103	98.9%
$150,000 to $200,000	321	9.1%	$150,200	9.6%	$149,700	9.4%	$500	98.8%
$200,000 to $300,000	255	7.2%	$122,950	7.8%	$122,950	6.3%	$0	98.8%
$300,000 to $500,000	150	4.2%	$73,250	4.7%	$73,250	3.6%	$0	95.3%

FAGI	#	% of total	Total Credit	% of total	Total Credit Used	Credit Used As A % of Tax Liability	Credit Carried Forward	% of Claims Verified
$500,000 to $750,000	72	2.0%	$35,200	2.2%	$35,200	2.0%	$0	97.2%
$750,000 to $1,000,000	32	0.9%	$15,400	1.0%	$15,400	1.3%	$0	96.9%
Over $1,000,000	62	1.7%	$29,600	1.9%	$29,600	0.6%	$0	100.0%
Total	3,548		$1,571,100		$1,535,051		$36,409	98.3%

TABLE 2
PUBLIC SCHOOL EXTRACURRICULAR ACTIVITY FEE CREDIT REVIEWED AND DEEMED VALID BY SIZE OF FEDERAL ADJUSTED GROSS INCOME

FAGI	#	% of total	Total Credit	% of total	Total Credit Used	Credit Used As A % of Tax Liability	Credit Carried Forward
$25,000 or less	1,539	4.2%	$261,822	3.9%	$189,867	48.2%	$71,956
$25,000 to $50,000	7,164	19.6%	$1,257,098	18.9%	$1,218,341	28.8%	$40,626
$50,000 to $75,000	9,278	25.4%	$1,665,867	25.1%	$1,655,944	15.7%	$20,584
$75,000 to $100,000	7,287	20.0%	$1,337,172	20.1%	$1,333,566	9.8%	$6,377
$100,000 to $150,000	6,171	16.9%	$1,158,575	17.5%	$1,154,562	6.4%	$5,293
$150,000 to $200,000	2,160	5.9%	$407,524	6.1%	$405,341	3.8%	$2,765
$200,000 to $300,000	1,481	4.1%	$283,880	4.3%	$282,012	2.5%	$2,298
$300,000 to $500,000	808	2.2%	$152,243	2.3%	$151,714	1.3%	$800
$500,000 to $750,000	306	0.8%	$57,822	0.9%	$57,622	0.8%	$400
$750,000 to $1,000,000	113	0.3%	$21,066	0.3%	$21,066	0.5%	$0
Over $1,000,000	172	0.5%	$33,132	0.5%	$32,732	0.2%	$400
Total	**36,479**		**$6,636,201**		**$6,502,767**		**$151,499**

TABLE 3
PRIVATE SCHOOL TAX CREDIT DONATIONS, 1999 COMPARED TO 1998

	CY99 DONATIONS		CY98 DONATIONS		% CHANGE	
	31,875	$13,706,611	4,247	$1,816,299	651%	655%
	#	#	#	#	#	#
Arizona Adventist Scholarships Inc.	371	$163,563	0	$0	not operational in 1998	
Arizona Christian School Tuition Organization	6,173	$2,816,791	1,197	$538,611	416%	423%
Arizona Episcopal Schools Foundation	754	$320,081	0	$0	not operational in 1998	
Arizona Independent Schools Scholarship Foundation	750	$329,710	78	$32,480	862%	915%
Arizona Native Scholastic and Enrichment Resources	38	$12,605	0	$0	not operational in 1998	
Arizona Private Education Scholarship Fund	424	$195,120	0	$0	not operational in 1998	
Arizona Scholarship Fund	793	$362,930	18	$6,900	4306 %	5160 %
Arizona Scholarships & Grants Organization			0	$0	not reported yet for 1999	

	CY99 DONATIONS		CY98 DONATIONS		% CHANGE	
	31,875	$13,706,611	4,247	$1,816,299	651%	655%
	#	#	#	#	#	#
Arizona Scholarships & Tuition Inc.	0	$0	51	$23,075	not operational in 1999	
Arizona School Choice Trust	1,085	$590,189	27	$9,525	3919%	6096%
Brophy Community Foundation	1,534	$617,374	392	$163,603	291%	277%
Catholic Tuition Organization of the Diocese of Phoenix	11,060	$4,672,380	1,988	$837,140	456%	458%
Catholic Tuition Organization of the Diocese of Tucson	3,198	$1,198,551	0	$0	not operational in 1998	
Chediar Scholarship Organization Inc.	623	$257,025	0	$0	not operational in 1998	
Christian Scholarship Fund of Arizona	20	$8,350	170	$72,235	-88%	-88%
Educare Scholarship Fund	204	$88,373	0	$0	not operational in 1998	
Florence Englehardt/Pappas Foundation	55	$22,893	0	$0	not operational in 1998	
Foundation for Montessori Scholarships	16	$6,100	0	$0	not operational in 1998	
Higher Education for Lutheran Program (H E L P)	592	$252,951	78	$32,355	659%	682%

	CY99 DONATIONS		CY98 DONATIONS		% CHANGE	
	31,875	$13,706,611	4,247	$1,816,299	651%	655%
	#	#	#	#	#	#
Institute for Better Education	603	$260,593	57	$24,570	958%	961%
Jewish Community Day School Scholarship Fund	818	$371,332	0	$0	not operational in 1998	
Lutheran Education Foundation	836	$355,733	1	$100	8350 0%	3556 33%
Maranatha Christian Co-Op Tuition Fund	14	$6,025	4	$1,455	250%	314%
Montessori School Tuition Organization	92	$43,400	0	$0	not operational in 1998	
Northern Arizona Christian School Scholarship Fund	370	$125,897	100	$38,700	270%	225%
Patagonia Scholarship Fund	35	$14,147	0	$0	not operational in 1998	
Prescott Christian School Scholarship Foundation	320	$137,000	0	$0	not operational in 1998	
School Tuition Association of Yuma	177	$74,230	0	$0	not operational in 1998	
Schools With Heart Foundation	221	$91,350	0	$0	not operational in 1998	

	CY99 DONATIONS		CY98 DONATIONS		% CHANGE	
	31,875	$13,706,611	4,247	$1,816,299	651%	655%
	#	#	#	#	#	#
Southern Arizona Foundation for Education (S A F E)	367	$162,082	58	$22,250	533%	628%
Tesseract Tuition Organization	280	$133,015	28	$13,300	900%	900%
VVBC Christian Education Fund	27	$12,600	0	$0	not operational in 1998	
Walter T Beams Scholarship Foundation	25	$4,221	0	$0	not operational in 1998	

TABLE 4
SCHOLARSHIPS PROVIDED BY SCHOOL TUITION ORGANIZATIONS, 1999 COMPARED TO 1998

	CY99 SCHOLARSHIPS		CY98 SCHOLARSHIPS		% CHANGE	
	3,726	$2,377,319	326	$167,650	1043%	1318%
	#	#	#	#	#	#
Arizona Adventist Scholarships Inc.	224	$74,395	0	$0	not operational in 1998	
Arizona Christian School Tuition Organization	1,015	$746,184	0	$0		
Arizona Episcopal Schools Foundation	0	$0	0	$0	not operational in 1998	
Arizona Independent Schools Scholarship Foundation	22	$30,120	82	$32,480	-73%	-7%
Arizona Native Scholastic and Enrichment Resources	0	$0	0	$0	not operational in 1998	
Arizona Private Education Scholarship Fund	0	$0	0	$0	not operational in 1998	
Arizona Scholarship Fund	122	$39,736	0	$0		

	CY99 SCHOLARSHIPS		CY98 SCHOLARSHIPS		% CHANGE	
	3,726	$2,377,319	326	$167,650	1043%	1318%
	#	#	#	#	#	#
Arizona Scholarships & Grants Organization			0	$0	not reported yet for 1999	
Arizona Scholarships & Tuition Inc.	0	$0	42	$26,360	not operational in 1999	
Arizona School Choice Trust	declined to report		0	$0		
Brophy Community Foundation	89	$149,086	0	$0		
Catholic Tuition Organization of the Diocese of Phoenix	1,335	$795,823	0	$0		
Catholic Tuition Organization of the Diocese of Tucson	0	$0	0	$0	not operational in 1998	
Christian Scholarship Fund of Arizona	158	$59,027				
Educare Scholarship Fund	0	$0	0	$0	not operational in 1998	
Florence Englehardt/Pappas Foundation	0	$0	0	$0	not operational in 1998	
Foundation for Montessori Scholarships	0	$0	0	$0	not operational in 1998	

	CY99 SCHOLARSHIPS		CY98 SCHOLARSHIPS		% CHANGE	
	3,726	$2,377,319	326	$167,650	1043%	1318%
	#	#	#	#	#	#
Higher Education for Lutheran Program (HELP)	464	$249,827	116	$31,380	300%	696%
Institute for Better Education	59	$27,000	unknown	$20,180		34%
Jewish Community Day School Scholarship Fund	0	$0	0	$0	not operational in 1998	
Lutheran Education Foundation	0	$0	0	$0		
Maranatha Christian Co-Op Tuition Fund	5	$3,926	0	$0		
Montessori School Tuition Organization	53	$38,900	0	$0	not operational in 1998	
Northern Arizona Christian School Scholarship Fund	49	$50,989	30	$35,000	63%	46%
Patagonia Scholarship Fund	4	$6,536	0	$0	not operational in 1998	

	CY99 SCHOLARSHIPS		CY98 SCHOLARSHIPS		% CHANGE	
	3,726	$2,377,319	326	$167,650	1043%	1318%
	#	#	#	#	#	#
Prescott Christian School Scholarship Foundation	0	$0	0	$0	not operational in 1998	
School Tuition Association of Yuma	77	$68,606	0	$0	not operational in 1998	
Schools With Heart Foundation	0	$0	0	$0	not operational in 1998	
Southern Arizona Foundation for Education (S A F E)			56	$22,250	**not reported yet for 1999**	
Tesseract Tuition Organization	34	$24,250	0	$0		
VVBC Christian Education Fund	14	$11,914	0	$0	not operational in 1998	
Walter T Beamis Scholarship Foundation	2	$1,000	0	$0	not operational in 1998	

ADDENDUM D
Department of Revenue Private School Tuition Organization Report for 2003

PRIVATE SCHOOL TUITION ORGANIZATION INDIVIDUAL INCOME TAX CREDIT

The individual income tax credit for contributions to school tuition organizations, more commonly referred to as the private school tax credit, is governed by A.R.S. §43-1089. In the 2003 legislative session this statute was changed, imposing reporting requirements on the private school tuition organizations (STOs) beginning with calendar year 2003. STOs must report the following information to the Arizona Department of Revenue by February 28.

1. The name, address and contact name of the STO.
2. The number of contributions received in the previous calendar year.
3. The dollar amount of contributions received in the previous calendar year.
4. The number of children awarded scholarships or grants during the previous calendar year.
5. The dollar amount of scholarships and grants awarded during the previous calendar year.
6. The name and address of each school receiving the scholarships or grant money, along with the number and dollar amount of scholarships or grants provided to each school.

The Arizona Department of Revenue is aware of 51 STOs operating in Arizona in 2003. Four STOs[1] have failed to provide any information. These four STOs have been contacted by telephone and/or letter requesting the required information. (There is no penalty in statute for failure to report.) One of these has not yet acknowledged the request for information. The other three STOs have indicated they will provide the missing data as soon as possible.

For those STOs that have reported (both for 2003 and for prior years), the number and amount of donations are set out in the following table. For calendar year 2003, $29.1 million has been reported by 47 STOs, an 11.1% increase over the donations reported for 2002. The largest STO, the Catholic Tuition Organization for the Diocese of Phoenix, reported $7.5 million in donations, or 26% of the total. To review the donations reported by each STO, see Appendix I at the end of this report.

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[1] Arizona Native Scholastic and Enrichment Resources, Chaparral Mission Scholarship Fund, Investing in Children of Arizona Scholarship Fund and Southern Arizona Foundation for Education

Calendar Year	# of STOs Reporting	# of Donations	Amount	% change in amount
2003	47	57,360	$29,063,443	11.1%
2002	41	52,032	$26,169,177	5.2%
2001[2]	43	46,605	$24,865,295	41.1%
2000	37	38,084	$17,620,022	28.5%
1999	33	31,892	$13,716,791	
1998[3]	16	4,248	$1,816,799	

STOs reported $24.2 million in scholarships paid to 19,778 students in 2003, an average of $1,222 per scholarship. This is a 21% increase in scholarships reported over calendar year 2002. The following table shows the history of scholarships and grants paid out by STOs, based on information reported to the Department of Revenue. (Some STOs reported donations received but did not report scholarships paid out in prior years.) Average scholarship as shown in the table is calculated *only* for those STOs that reported *both* the number and amount of scholarships paid. The range of average scholarship amounts is from $108 (Patagonia Scholarship Fund) to $8,936 (New Way Learning Academy School Tuition Organization). To review the scholarships paid by each STO, see Appendix II at the end of this report.

[2] The maximum donation for taxpayers filing as married filing joint increased to $625 from $500.

[3] Activity in 1998 was artificially low due to a court case challenging the constitutionality of the credit based on separation of church and state. The credit was determined to be constitutional.

Calendar Year	# of STOs Reporting	# of Scholarships	Amount	% chg in amount	Average Scholarship
2003	47	19,778	$24,178,430	20.6%	$1,222
2002	38	19,510	$22,459,984	39.3%	$1,140
2001	37	18,058	$16,120,146	18.4%	$885
2000	34	15,377	$13,609,939	472.4%	$883
1999	30	3,727	$2,377,819		$638
1998[4]	15	326	$167,650		$452

The *smallest* average scholarship paid by an STO to one private school was $67 paid by Arizona Scholarship Fund to Covenant Christian School. The *highest* average scholarship paid by an STO to one private school was $8,936 paid by New Way Learning Academy School Tuition Organization to New Way Learning Academy.

STOs provided scholarships and grants to 312 private schools throughout Arizona. Arizona School Choice Trust provided scholarships and grants to 116 schools throughout Arizona. Appendix III, at the end of this report, lists the number of schools to which each STO provided scholarships. Private schools received scholarship/grant money from as many as six different STOs. The following table shows the number of STOs contributing scholarship/grant money to the private schools.

[4] Activity in 1998 was artificially low due to a court case. See Footnote 3.

# of private schools receiving scholarships or grants from:	
One STO	162
Two STOs	72
Three STOs	32
Four STOs	30
Five STOs	11
Six STOs	5

In other words, 162 private schools received scholarship/grant money from only one STO. The five private schools that received scholarship or grant money from six different STOs were Brophy College Preparatory ($622,865), Paradise Valley Christian School ($189,810), Phoenix Christian Junior/Senior High School ($410,186), St. Jerome K8 School ($119,839), and Scottsdale Christian Academy, ($586,463).

The most scholarship/grant money received by one private school was $749,286 for 563 scholarships to Northwest Christian School. The scholarship/grant money came from four different STOs, for an average of $1,331. Appendix IV lists the 314 private schools that received scholarship/grant money, the number of scholarships, the amount and the average scholarship.

In terms of where the scholarship/grant money went within Arizona, the most money went to schools within the city of Phoenix. About 31% of the scholarships went to private schools in Phoenix and about 35% of the money. As would be expected, 65% of all scholarships granted were in Maricopa County

and 69% of the money. Appendix V shows the cities within which the scholarship/grant money was received.

APPENDIX I

SCHOOL TUITION ORGANIZATION	# of 2003 donations	2003 donations	% chg in #[5]	% chg in $
Alternative Schools Scholarship Fund	16	$7,725		
Arizona Adventist Scholarships	674	$292,124	5.0	(8.5)
Arizona Christian School Tuition Organization	12,218	$6,505,482	13.6	14.7
Arizona Episcopal Schools Foundation	1,125	$551,700	4.7	4.6
Arizona Independent Schools Scholarship Foundation	1,083	$568,209	4.9	5.2
Arizona International Academy Scholarship Fund	54	$27,735	22.7	20.4
Arizona Lutheran Scholarship Organization	126	$60,638		
Arizona Private Education Scholarship Fund	781	$455,455	9.8	16.2
Arizona Scholarship Fund	3,119	$1,609,591	40.0	40.9
Arizona Scholarships & Grants Organization (Giving Kids the Credit)	23	$6,775		
Arizona School Choice Trust	2,786	$1,386,153	(9.2)	(5.9)

[5] No percent change indicated that the STO was not operational in the prior year OR they did not report

SCHOOL TUITION ORGANIZATION	# of 2003 donations	2003 donations	% chg in #[5]	% chg in $
Arizona Waldorf Scholarship Fund	91	$45,575	(26.6)	(21.6)
BEST Student Fund	256	$130,896	1.6	2.6
Bret Reed Freesmever Memorial Scholarship Fund	111	$61,106	4.7	(7.9)
Brophy Community Foundation	1,649	$807,852	5.2	6.6
Carden Schools Scholarship Fund	19	$8,750	90.0	73.3
Catholic Tuition Organization of the Diocese of Phoenix	14,266	$7,549,303	4.0	4.6
Catholic Tuition Support Organization for the Diocese of Tucson	7,081	$2,942,431	8.6	10.5
Chabad Tuition Organization	184	$78,509	4.5	9.3
Cheder Scholarship Organization	781	$314,782		
Christ Lutheran School Foundation	372	$193,185	12.7	12.0
Christian Scholarship Fund of Arizona	802	$401,837	9.9	11.3
Classical Christian Scholarship Fund	54	$38,200		
Cochise Christian School Tuition Organization	123	$68,429		
Dynamite Montessori Foundation	23	$13,000		
Educare Scholarship Fund	122	$65,970	(31.1)	(28.3)

SCHOOL TUITION ORGANIZATION	# of 2003 donations	2003 donations	% chg in #	% chg in $
Engelhardt/Pappas Foundation	399	$199,608	17.4	12.8
Flagstaff Christian Scholarship Fund	337	$143,820	39.8	40.9
Foundation for Lutherans Interested in Funding Education	67	$32,073		
Foundation for Montessori Scholarships	85	$41,300	(23.4)	(26.9)
Higher Education for Lutheran Program	1,290	$657,767	19.2	16.5
Institute for Better Education	1,963	$1,019,712	26.2	30.4
Jewish Community Day School Scholarship Fund	2,175	$1,176,078	18.1	17.9
Lutheran Education Foundation	498	$258,307	0.0	13.3
Montessori Centre School Tuition Organization	51	$28,222	37.8	43.0
Montessori Scholarship Organization	226	$125,238	(14.7)	(8.3)
New Way Learning Academy School Tuition Organization	247	$123,764	13.8	13.4
Northern Arizona Christian School Scholarship Fund	239	$108,866	(6.6)	2.3
Orme Primavera Schools Foundation	245	$126,573	(2.4)	(1.4)

SCHOOL TUITION ORGANIZATION	# of 2003 donations	2003 donations	% chg in #s	% chg in $
Patagonia Scholarship Fund	28	$14,275	(17.6)	(14.1)
Prescott Christian School Scholarship Foundation	411	$195,238	12.3	9.6
School Tuition Association of Yuma	360	$191,570	(1.4)	(1.1)
Schools With Heart Foundation	366	$184,582	13.7	17.1
Shepherd of the Desert Education Program	135	$73,504	(5.6)	(8.9)
Tempe Montessori's Parents Organization	215	$100,950	48.3	39.7
WBC Christian Education Fund	40	$22,160	(23.1)	(18.1)
Yuma's Education Scholarship Fund for Kids	84	$48,425		

APPENDIX II

SCHOOL TUITION ORGANIZATION	# of 2003 scholarships	2003 scholarships	% chg in #[6]	% chg in $	Average scholarship
Alternative Schools Scholarship Fund	15	$6,562			$437.47
Arizona Adventist Scholarships	845	$300,479	36.1	14.7	$355.60
Arizona Christian School Tuition Organization	3,929	$5,304,647	7.7	15.5	$1,350.13
Arizona Episcopal Schools Foundation	131	$499,236	(10.9)	7.0	$3,810.96
Arizona Independent Schools Scholarship Foundation	81	$506,035	(19.8)	3.1	$6,247.35
Arizona International Academy Scholarship Fund	28	$21,200	(9.7)	14.3	$757.14
Arizona Lutheran Scholarship Organization	27	$69,638			$2,579.17
Arizona Private Education Scholarship Fund	240	$355,309	5.3	34.2	$1,480.45
Arizona Scholarship Fund	1,024	$1,171,249	27.2	54.6	$1,143.80
Arizona Scholarships & Grants	0	$0			$0

[6] No percent change indicates that the STO was not operational in the prior year OR they did not report.

SCHOOL TUITION ORGANIZATION	# of 2003 scholarships	2003 scholarships	% chg in #	% chg in $	Average scholarship
Organization (Giving Kids the Credit)					
Arizona School Choice Trust	605	$912,231	(20.1)	(4.7)	$1,507.82
Arizona Waldorf Scholarship Fund	29	$41,018	(21.6)	(21.6)	$4,414.41
Best Student Fund	40	$120,198	(64.9)	11.6	$3,004.95
Bret Reed Freesmever Memorial Scholarship Fund	36	$56,324	33.3	(4.3)	$1,564.56
Brophy Community Foundation	304	$677,462	(8.7)	(4.5)	$2,228.49
Carden Schools Scholarship Fund	7	$4,525	(22.2)	(57.4)	$646.43
Catholic Tuition Organization of the Diocese of Phoenix	6,091	$6,506,914	(12.3)	(7.2)	$1,000.05
Catholic Tuition Support Organization for the Diocese of Tucson	2,548	$2,548,136	5.0	5.5	$1,068.28
Chabad Tuition Organization	16	$73,065		50.8	$4,562.81
Cheder Scholarship Organization	85	$297,488			$3,499.86
Christ Lutheran School Foundation	61	$87,916	(28.2)	(35.3)	$1,441.25
Christian Scholarship Fund of Arizona	267	$333,796	9.9	11.3	$1,250.17

SCHOOL TUITION ORGANIZATION	# of 2003 scholarships	2003 scholarships	% chg in #	% chg in $	Average scholarship
Classical Christian Scholarship Fund	4	$1,395			$348.75
Cochise Christian School Tuition Organization	75	$75,197			$1,002.63
Dynamite Montessori Foundation	32	$14,676			$458.63
Educare Scholarship Fund	66	$66,175	(53.2)	(50.3)	$1,002.65
Engelhardt/Pappas Foundation	31	$112,914	34.8	(23.1)	$3,642.40
Flagstaff Christian Scholarship Fund	105	$92,415	26.5	(4.7)	$880.14
Foundation for Lutherans Interested in Funding Education	52	$24,455			$470.29
Foundation for Montessori Scholarships	17	$32,930		(10.9)	$1,937.06
Higher Education for Lutheran Program	824	$640,494	0.5	19.6	$777.30
Institute for Better Education	873	$861,660	39.9	61.0	$987.01
Jewish Community Day School Scholarship Fund	221	$958,753	0.0	0.0	$4,338.25
Lutheran Education Foundation	108	$228,750	(18.8)	(22.1)	$2,118.06
Montessori Centre School Tuition Organization	27	$28,192	80.0	33.2	$1,044.16

SCHOOL TUITION ORGANIZATION	# of 2003 scholarships	2003 scholarships	% chg in #	% chg in $	Average scholarship
Montessori Scholarship Organization	109	$132,985	12.4	(5.7)	$1,220.05
New Way learning Academy School Tuition Organization	11	$98,300			$8,936.36
Northern Arizona Christian School Scholarship Fund	138	$87,937	(25.4)	(2.3)	$637.22
Orme Primavera Schools Foundation	49	$124,750	2.1	17.0	$2,545.92
Patagonia Scholarship Fund	128	$13,790		1.6	$107.73
Prescott Christian School Scholarship Foundation	133	$197,269	(32.5)	3.4	$1,483.23
School Tuition Association of Yuma	169	$155,260	(18.0)	(18.6)	$918.70
Schools With Heart Foundation	46	$139,547	(30.3)	(0.6)	$3,033.63
Shepherd of the Desert Education Program	67	$56,272	131.0	162.6	$839.88
Tempe Montessori's Parents Organization	54	$99,113			$1,835.42
VVBC Christian Education Fund	11	$27,437	(35.3)	(6.1)	$2,494.27
Yuma's Education Scholarship Fund for Kids	19	$14,395			$757.63

APPENDIX III

SCHOOL TUITION ORGANIZATION	# of schools to which scholarships/grants were provided
Alternative Schools Scholarship Fund	2
Arizona Adventist Scholarships	14
Arizona Christian School Tuition Organization	97
Arizona Episcopal Schools Foundation	4
Arizona Independent Schools Scholarship Foundation	3
Arizona International Academy Scholarship Fund	2
Arizona Lutheran Scholarship Organization	2
Arizona Private Education Scholarship Fund	17
Arizona Scholarship Fund	92
Arizona School Choice Trust	**116**
Arizona Waldorf Scholarship Fund	3
BEST Student Fund	2

SCHOOL TUITION ORGANIZATION	# of schools to which scholarships/grants were provided
Bret Reed Freesmeyer Memorial Scholarship Fund	6
Brophy Community Foundation	14
Carden Schools Scholarship Fund	2
Catholic Tuition Organization of the Diocese of Phoenix	36
Catholic Tuition Support Organization for the Diocese of Tucson	25
Chabad Tuition Organization	2
Cheder Scholarship Organization	3
Christ Lutheran School Foundation	2
Christian Scholarship Fund of Arizona	17
Classical Christian Scholarship Fund	1
Cochise Christian School Tuition Organization	6
Dynamite Montessori Foundation	1
Educare Scholarship Fund	6

SCHOOL TUITION ORGANIZATION	# of schools to which scholarships/grants were provided
Engelhardt/Pappas Foundation	5
Flagstaff Christian Scholarship Fund	2
Foundation for Lutherans Interested in Funding	2
Education Foundation for Montessori Scholarships	3
Higher Education for Lutheran Program	13
Institute for Better Education	40
Jewish Community Day School Scholarship Fund	7
Lutheran Education Foundation	11
Montessori Centre School Tuition Organization	3
Montessori Scholarship Organization	5
New Way Learning Academy School Tuition Organization	1
Northern Arizona Christian School Scholarship Fund	2
Orme Primavera Schools Foundation	2

SCHOOL TUITION ORGANIZATION	# of schools to which scholarships/grants were provided
Patagonia Scholarship Fund	2
Prescott Christian School Scholarship Foundation	4
School Tuition Association of Yuma	9
Schools With Heart Foundation	3
Shepherd of the Desert Education Program	8
Tempe Montessori's Parents Organization	2
WBC Christian Education Fund	7
Yuma's Education Scholarship Fund for Kids	1

APPENDIX IV

School	# of Scholarships	Scholarship $	Avg. Scholarship
91st Psalms Christian School	43	$41,462	$964
A Child's View	2	$2,600	$1,300
Abbie Loveland Tuller	15	$46,973	$3,132
Abiding Savior School	7	$4,748	$678
Adobe Adventist Christian School	37	$11,766	$318
Aldea Montessori	3	$2,969	$990
Aletheia Classical Christian School	33	$32,833	$995
Al-Huda School	8	$35,575	$4,447
All Saint's Episcopal Day School	31	$189,729	$6,120
Alpha Omega Academy	2	$2,000	$1,000
American Christian Academy	1	$3,420	$3,420
American Indian Christian School	1	$1,688	$1,688
Anshei Israel	1	$7,826	$7,826
Apostolic Faith Center Christian Academy	3	$2,213	$738
Arcadia Christian School	33	$34,277	$1,039

School	# of Scholarships	Scholarship $	Avg. Scholarship
Arizona Cultural Academy	93	$176,500	$1,898
Arizona International Academy	27	$20,637	$764
Arizona Lutheran Academy	136	$198,737	$1,461
Armstrong Academy	60	$73,584	$1,226
Arrowhead Christian Academy	59	$49,695	$842
Atonement Lutheran High School	2	$4,913	$2,457
Awakening Seed School	12	$26,198	$2,183
Beautiful Savior Academy	19	$20,421	$1,075
Berean Christian Academy	30	$31,440	$1,048
Beth El Center for Early Childhood Education Kindergarten	8	$23,900	$2,988
Bethany Christian School	148	$231,179	$1,562
Bethany Christian School	5	$5,661	$1,132
Bethany Learning Center	29	$29,696	$1,024

School	# of Scholarships	Scholarship $	Avg. Scholarship
Blessed Sacrament Kindergarten	14	$26,454	$1,890
Bourgade Catholic High School	226	$355,219	$1,572
Brophy College Preparatory	162	$622,885	$3,845
Calvary Academy	40	$52,330	$1,308
Calvary Baptist School	13	$7,570	$582
Calvary Christian Academy	32	$21,146	$661
Camelback Christian School	2	$3,110	$1,555
Camelback Desert School	1	$3,000	$3,000
Camp Verde United Christian School	59	$62,110	$1,053
Carden Christian Academy	24	$19,420	$809
Carden of the Peaks Academy	5	$3,650	$730
Casas Christian School	156	$237,734	$1,524
Castlehill Country Day School	55	$67,345	$1,224
Cathedral Christian Academy	96	$125,528	$1,308

School	# of Scholarships	Scholarship $	Avg. Scholarship
Cathedral of Praise Christian School	7	$2,898	$414
Central Christian Academy	36	$33,623	$934
Chandler Christian School	75	$73,857	$985
Chapel in the Hills	19	$10,972	$577
Christ Greenfield Lutheran School	64	$ 92,162	$1,440
Christ Lutheran School	85	$99,212	$1,167
Christ the King Academy	7	$8,910	$1,273
Christ the King Catholic School	199	$153,213	$770
Christ the Redeemer Lutheran	56	$35,889	$641
Christian Academy of Prescott	75	$95,630	$1,275
Community Montessori School	11	$6,044	$549
Concordia Lutheran School	11	$32,950	$2,995
Cornerstone Christian Academy	18	$18,978	$1,054
Cornerstone Christian Academy	105	$162,202	$1,545

School	# of Schol-arships	Schol-arship $	Avg. Schol-arship
Covenant Christian School	10	$2,155	$216
Covenant Homeschool Resource Center	3	$248	$83
Crossroads Community School	71	$91,213	$1,285
Dayspring Kindergarten	35	$58,354	$1,667
Desert Christian High School	245	$306,249	$1,250
Desert Christian Middle School	4	$2,283	$571
Desert Garden Montessori	71	$55,998	$789
Desert Springs Christian Kindergarten	30	$29,573	$986
Desert Sun Child Development Center	8	$13,770	$1,721
Desert Valley Christian School	70	$25,597	$366
Desert View Learning Center	11	$52,775	$4,798
Desert Voices Oral learning Center	5	$20,673	$4,135
Dobson Montessori School	94	$26,531	$282

School	# of Scholarships	Scholarship $	Avg. Scholarship
Dove Christian School	29	$31,141	$1,074
Dynamite Montessorri	32	$14,676	$459
East Fork Lutheran Grade School	77	$10,377	$135
East Fork Lutheran High School	58	$18,821	$325
East Valley Christian Academy	8	$4,596	$575
Educational Special Needs Services	5	$975	$195
El Dorado Grayhawk	19	$16,661	$877
Emmanuel Christian Academy	4	$4,496	$1,124
Emmanuel Lutheran School	75	$57,057	$761
Emmaus Lutheran School	57	$48,259	$847
Enchanted Desert School	27	$40,418	$1,497
Faith Christian School	38	$55,580	$1,463
Faith Community Academy	26	$25,129	$967

School	# of Scholarships	Scholarship $	Avg. Scholarship
Faith Evangelical Lutheran School	1	$2,380	$2,380
Family of Christ Child Development Center	4	$2,600	$650
Firm Foundations	7	$1,673	$239
First Baptist Christian Academy	40	$49,009	$1,225
First Baptist Christian School	23	$10,305	$448
First Southern Christian School	64	$48,956	$765
Flagstaff Adventist School	34	$8,238	$242
Fountain of Life Lutheran School	6	$7,752	$1,292
Gateway Bible Church Christian Training Center	2	$720	$360
Gethsemane Lutheran School	61	$76,776	$1,259
Glendale Christian Academy	37	$35,561	$961
Glenview Adventist School	75	$38,725	$516
God's Garden Child Development Center	1	$633	$633
Golf Links Christian School	15	$8,825	$588

School	# of Scholarships	Scholarship $	Avg. Scholarship
Good Shepherd Lutheran School	29	$19,136	$660
Good Steps Christian School	1	$888	$888
Grace Chapel Christian School	3	$1,998	$666
Grace Community Christian School	327	$481,112	$1,471
Grace Fellowship Academy	6	$2,333	$389
Grace Lutheran School	108	$73,180	$678
Gray Education Program	1	$6,689	$6,689
Green Fields Country Day School	24	$154,451	$6,435
Guiding Light School	20	$35,353	$1,768
Happy Trans School	3	$2,866	$955
Harvest Christian Academy	16	$7,273	$455
Heritage Christian Academy	75	$113,760	$1,517
Highland Free School	14	$5,562	$397
Holbrook Indian School	47	$11,288	$240
Holy Angel School	131	$103,051	$787

School	# of Scholarships	Scholarship $	Avg. Scholarship
Hopi Mission School	82	$82,275	$1,003
Immaculate Conception School	112	$61,713	$551
Immaculate Heart Academy	72	$97,478	$1,354
Immaculate Heart of Mary High School	20	$55,530	$2,777
International School of Arizona	10	$13,053	$1,305
Jess Schwartz Jewish Community High School	20	$135,028	$6,751
Jewish Community Center	12	$29,000	$2,417
Joy Community School	147	$295,221	$2,008
Khalsa Montessori School	1	$675	$675
Kids' Discovery Club Christian Kindergarten	2	$1,175	$588
King David School	73	$303,300	$4,155
Kingman Adventist School	19	$6,952	$366
Kino Learning Center	18	$53,220	$2,957

School	# of Scholarships	Scholarship $	Avg. Scholarship
Lambts Gate Kindergarten	17	$21,499	$1,265
Lestonnac Kindergarten	15	$7,027	$468
Life Academy	2	$1,160	$580
Light & Life Christian School	49	$56,222	$1,147
Lighthouse Academy	7	$4,820	$689
Loretto School	51	$53,124	$1,042
Lourdes Catholic School	61	$104,352	$1,711
Martin Luther School	66	$95,277	$1,444
Mission Christian School	50	$31,353	$627
Montessori Center School	11	$23,999	$2,182
Montessori Children House	9	$17,930	$1,992
Montessori Day School	7	$13,800	$1,971
Montessori Education Centre-Main	14	$13,400	$957
Montessori Education Centre-North	11	$13,897	$1,263
Montessori International	31	$55,144	$1,779

School	# of Scholarships	Scholarship $	Avg. Scholarship
Montessori Kingdom of Learning	68	$86,387	$1,270
Montessori Learning Center	2	$3,280	$1,640
Montessori Sunrise School	2	$895	$448
Montessori West Preparatory School	18	$18,026	$1,001
Most Holy Trinity Catholic School	213	$139,026	$653
Mount Calvary Lutheran School	32	$33,973	$1,062
Navajo Lutheran Mission School	42	$79,838	$1,901
Nellie P. Covert School	12	$36,000	$3,000
New Hope Christian Academy	76	$84,053	$1,106
New Horizons Academy	3	$2,430	$810
New Vistas Academy	2	$2,625	$1,313
New Way Learning Academy	14	$100,583	$7,185
Northminster Christian School	12	$11,641	$970
Northwest Christian School	563	$749,286	$1,331

School	# of Scholarships	Scholarship $	Avg. Scholarship
Notre Dame Preparatory	48	$118,220	$2,463
Opincar Study Center	1	$885	$885
Our Lady of Mount Carmel School	421	$214,515	$510
Our Lady of Perpetual Help School	161	$207,868	$1,291
Our lady of Perpetual Help School	485	$260,651	$537
Our Lady of the Mountains	93	$97,935	$1,053
Our Mother of Sorrows	73	$83,834	$1,148
Our Savior Lutheran School	40	$2,830	$71
Our Savior Lutheran School	38	$16,485	$434
Pace Christian School	4	$3,423	$856
Palms Academy Christian School	16	$14,884	$930
Palo Verde Christian School	60	$56,016	$934
Paradise for Tots Christian Kindergarten	7	$10,394	$1,485

School	# of Scholarships	Scholarship $	Avg. Scholarship
Paradise Mountain Christian Academy	38	$30,223	$795
Paradise Valley Christian	164	$189,810	$1,157
Pardes Jewish Day School	55	$243,250	$4,423
Parkway Children's School of Excellence	3	$2,568	$856
Patagonia Montessori Private School	116	$13,290	$115
Payson Community Christian School	30	$8,375	$1,279
Peace Lutheran Church School	23	$10,140	$441
Pentecostal of Phoenix Christian Academy	2	$1,968	$984
Peridot Lutheran School	31	$4,178	$135
Phillips Christian School	4	$1,035	$259
Phoenix Christian Academy	10	$10,395	$1,040
Phoenix Christian Grade School	87	$125,567	$1,443
Phoenix Christian Junior/Senior High	279	$410,186	$1,470

School	# of Scholarships	Scholarship $	Avg. Scholarship
Phoenix Country Day School	20	$146,398	$7,320
Phoenix Grade School	1	$3,375	$3,375
Phoenix Hebrew Academy	38	$194,005	$5,105
Phoenix Metro Islamic School	43	$115,498	$2,686
Phoenix Special Programs and Academies	9	$1,388	$154
Pilgram Lutheran School	55	$48,888	$889
Pleasantview Christian Elementary School	3	$2,588	$863
Pope John XXIII Catholic School	129	$204,708	$1,587
Potter's House	2	$563	$281
Prescott Adventist School	27	$5,813	$215
Primavera School	27	$53,750	$1,991
Providence Classical School	3	$3,001	$1,000
Providence Classical School	41	$64,554	$1,574
Pusch Ridge Christian Academy	158	$246,137	$1,558
Queen of Peace School	61	$82,972	$1,360

School	# of Scholarships	Scholarship $	Avg. Scholarship
Rainbow Academy	53	$42,703	$806
Rancho Solano Private School	32	$53,037	$1,657
Red Sands Christian School	1	$200	$200
Redeemer Christian Academy	27	$36,584	$1,355
Redeemer Lutheran School	99	$125,130	$1,264
Resurrection Lutheran Child Development Center	11	$32,000	$2,909
Risen Savior Lutheran School	28	$73,104	$2,611
River of Life Christian Academy	20	$8,759	$438
Sacred Heart School	72	$19,881	$276
Sacred Heart School	109	$242,095	$2,221
Safford Christian School	12	$10,954	$913
Saguaro Hills Adventist Christian School	70	$29,950	$428
Saguaro Hills Christian School	30	$36,644	$1,221
Saint Agnes Catholic School	146	$176,900	$1,212

School	# of Scholarships	Scholarship $	Avg. Scholarship
Saint Alban's Pre-School & Kindergarten	1	$1,045	$1,045
Saint Ambrose Catholic School	179	$133,039	$743
Saint Andrews Presbyterian Pre-School & Kindergarten	13	$8,392	$646
Saint Anne's Little Flower School	86	$86,036	$1,000
Saint Anthony School	60	$60,000	$1,000
Saint Augustine High School	7	$20,000	$2,857
Saint Catherine of Siena School	94	$126,795	$1,349
Saint Charles Apache School	105	$130,500	$1,243
Saint Cyril's Catholic School	121	$174,910	$1,446
Saint- Daniel the Prophet School	63	$93,461	$1,484
Saint Elizabeth Ann Seaton	7	$8,520	$1,217
Saint Francis Catholic School	45	$50,454	$1,121
Saint Francis Kindergarten	2	$2,740	$1,370

School	# of Schol arships	Schol arship $	Avg. Schol arship
Saint Francis Xavier Elementary School	318	$160,790	$506
Saint Gregory Catholic School	7	$4,051	$579
Saint Gregory College	51	$224,587	$4,404
Saint Gregory School	197	$173,095	$879
Saint Jerome K-8 School	87	$119,839	$1,377
Saint Joan of Arc School	19	$34,724	$1,828
Saint John Bosco School	263	$197,144	$750
Saint John the Evangelist	64	$150,924	$2,358
Saint John Vianney Catholic School	204	$291,070	$1,427
Saint Joseph's Catholic School	404	$103,948	$257
Saint Louis the King School	129	$119,369	$925
Saint Maria Goretti Kindergarten	14	$44,791	$3,199
Saint Mark's Methodist Pre-School	6	$4,590	$765

School	# of Scholarships	Scholarship $	Avg. Scholarship
Saint Mark's Presbyterian Pre-School & Kindergarten	7	$16,702	$2,386
Saint Mary School	211	$139,160	$660
Saint Mary-Basha Catholic Elementary School	485	$247,868	$511
Saint Mary's High School	277	$519,816	$1,877
Saint Matthew School	158	$247,638	$1,567
Saint Michael Indian School	415	$101,893	$246
Saint Michael's Parish Day School	89	$175,908	$1,976
Saint Paul Lutheran School	3	$4,500	$1,500
Saint Paul's Preparatory Academy	21	$118,399	$5,638
Saint Peter Mission School	146	$146,000	$1,000
Saint Theresa Catholic School	317	$171,775	$542
Saint Thomas Aquinas	96	$129,194	$1,346
Saint Thomas the Apostle School	250	$212,925	$852

School	# of Scholarships	Scholarship $	Avg. Scholarship
Saint Timothy's Catholic Academy	179	$201,120	$1,124
Saint Vincent de Paul School	175	$212,414	$1,214
Saints Peter & Paul Catholic School	135	$128,698	$953
Saints Simon & Jude Catholic School	144	$256,484	$1,781
Salpointe Catholic High School	224	$485,533	$2,168
San Xavier Indian School	117	$193,560	$1,654
Santa Cruz Catholic School	54	$98,369	$1,822
Satori	79	$76,880	$973
Scottsdale Christian Academy	441	$586,463	$1,330
Seton Catholic High School	136	$324,845	$2,389
Shepherd of the Desert Lutheran School	43	$37,997	$884
Sherwood Christian Academy	10	$5,552	$555
Shiloh Christian School	52	$35,143	$676

School	# of Scholarships	Scholarship $	Avg. Scholarship
Show Low Adventist Christian School	4	$1,520	$380
Skyway Christian School	11	$3,859	$351
Son Life Christian School	1	$2,205	$2,205
Southwestern Christian School	51	$34,563	$678
Southwestern Christian School	19	$21,505	$1,132
Stone Creek Christian Kindergarten	3	$585	$195
Summit School of Ahwatukee	17	$33,586	$1,976
Sun & Shield Christian Academy	13	$7,355	$566
Sun Valley Indian School	14	$14,263	$1,019
Sunrise Montessori School	10	$14,600	$1,460
Suriva Montessori	1	$563	$563
Surrey Garden Christian School	190	$312,722	$1,646
Sylvan Learning Center	2	$1,440	$720
Tempe Adventist Christian School	75	$19,872	$265

School	# of Scholarships	Scholarship $	Avg. Scholarship
Tempe Christian School	24	$29,365	$1,224
Tempe Montessori School	25	$44,475	$1,779
Tesseract School	9	$27,886	$3,098
The Beginning School	12	$12,595	$1,050
The Family School	25	$62,914	$2,517
The Learning Pad Christian Pre-School & Kindergarten	1	$900	$900
The Orme School	26	$76,703	$2,950
Thunderbird Adventist Academy	163	$75,248	$462
Thunderbird Christian Elementary School	187	$47,231	$253
Tri-City Christian Academy	171	$215,240	$1,259
Tri-City Jewish Community Center Day School	26	$84,275	$3,241
Trinity Christian School	1	$225	$225
Trinity Christian School	32	$56,931	$1,779

School	# of Scholarships	Scholarship $	Avg. Scholarship
Trinity Classical and Christian Academy	26	$18,463	$710
Trinity Cooperative Preschool & Kindergarten	8	$10,703	$1,338
Trinity Lutheran	76	$62,487	$822
Trinity United Methodist Pre-School & Kindergarten	6	$9,450	$1,575
Tucson Christian School	91	$54,079	$594
Tucson Community School	6	$8,921	$1,487
Tucson Hebrew	72	$260,662	$3,620
Turnina Point	29	$32,322	$1,115
Valley Cathedral Christian School	76	$83,817	$1,103
Valley Child Care & Learning Center	1	$1,800	$1,800
Valley Christian High School	236	$550,315	$2,332
Valley Lutheran High School	102	$177,265	$1,738
Valley of the Sun Jewish Community Center Kindergarten	10	$25,500	$2,550

School	# of Scholarships	Scholarship $	Avg. Scholarship
Verde Valley Adventist School	24	$12,369	$515
Verde Valley Christian School	112	$60,572	$541
Verde Valley Christian School	7	$8,050	$1,150
Veritas Christian Community School	50	$56,241	$1,125
Ville Marie Academy	80	$69,503	$869
White Mountain Montessori	8	$1,470	$184
Wickenburg Christian Academy	11	$15,086	$1,371
Xavier College Preparatory High School	168	$425,583	$2,533
Yeshivah High School	7	$22,500	$3,214
Yuma Adventist School	17	$9,538	$561
Yuma Catholic High School	65	$184,017	$2,831
Yuma Lutheran High School	115	$117,805	$1,024

APPENDIX V

School	# of Schol-arships	Schol-arship $	Avg. Schol-arship
Apache Junction	8	$4,596	$575
Avondale	96	$129,191	$1,346
Bapchule	146	$146,000	$1,000
Benson	3	$1,998	$666
Buckeye	6	$2,333	$389
Bylas	40	$2,830	$71
Camp Verde	112	$104,813	$936
Casa Grande	60	$60,000	$1,000
Cave Creek	32	$14,676	$459
Chandler	1066	$1,418,983	$1,331
Chino Valley	32	$56,931	$1,779
Cottonwood	158	$92,954	$588
Douglas	66	$60,151	$991
Elgin	12	$500	$42
Flagstaff	308	$197,597	$642
Gilbert	418	$607,681	$1,454
Glendale	790	$950,592	$1,203
Globe	131	$103,051	$787
Goodyear	220	$305,954	$1,391
Holbrook	47	$11,288	$240
Kingman	23	$11,448	$498
Kykotsmovi	82	$82,275	$1,003
Lake Havasu City	75	$43,292	$577
Litchfield Park	94	$80,513	$857
Marana	13	$7,355	$566
Mayer	26	$76,703	$2,950
Mesa	858	$861,741	$1,004

School	# of Schol-arships	Schol-arship $	Avg. Schol-arship
Nogales	133	$124,233	$934
Oro Valley	11	$32,000	$2,909
Page	4	$3,423	$856
Paradise Valley	98	$476,419	$4,861
Patagonia	104	$12,790	$123
Payson	30	$38,375	$1,279
Peoria	71	$88,600	$1,248
Peridot	31	$4,178	$135
Phoenix	6210	$8,492,423	$1,368
Pinetop	8	$1,470	$184
Prescott	301	$461,561	$1,533
Rock Point	42	$79,838	$1,901
Safford	12	$10,954	$913
San Carlos	105	$130,500	$1.243
Scottsdale	1413	$1,521,144	$1,077
Sedona	7	$8,050	$1,150
Show Low	5	$3,208	$642
Sierra Vista	235	$238,328	$1,014
Sonoita	12	$7,273	$455
St. Michael	415	$101,993	$246
Sun Valley	14	$14,263	$1,019
Tempe	1484	$1,671,468	$1,126
Tucson	3511	$4,694,335	$1,337
Whiteriver	135	$29,198	$216
Wickenburg	11	$15,086	$1,371
Wilcox	30	$15,125	$504
Winslow	1	$200	$200
Yuma	419	$466,560	$1,114

ADDENDUM E
Department of Revenue Private School Tuition Organization Report for 2004

INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2004 EXECUTIVE SUMMARY

- $31,871,900 in donations to private school tuition organizations was reported to the Arizona Department of Revenue for 2004. This is an increase of 8.2% over the $29,445,494 reported for 2003.
- 63,830 donations to private school tuition organizations were reported, an increase of 9.8% over 2003.
- The Department was aware of 55 school tuition organizations operating in Arizona in 2004, an increase from 51 in 2003. Of these 55 organizations, 53 submitted the statutorily-required report.
- Although the majority of donors to school tuition organizations are taxpayers filing with a married filing joint filing status who can claim a credit of up to $625, the average donation in 2004 was $499, down from $507 in 2003.
- Scholarships paid by school tuition organizations in 2004 totaled $28.2 million, a 15% increase over the amount of scholarships paid in 2003.
- The number of scholarships paid in 2004 was 21,160, a 5.1% increase over the 20,138 scholarships paid in 2003.

- 334 private schools in Arizona received scholarships money from school tuition organizations.
- 3 school tuition organizations gave scholarships to only one private school.
- 6 school tuition organizations gave scholarships to 25 or more private schools.
- The smallest average scholarship paid by a school tuition organization was $28, paid by Chaparral Mission Scholarship Fund to Navajo Trails in Winslow.
- The largest average scholarship paid by a school tuition organization was $12,376, paid by New Way Learning Academy School Tuition Organization to New Way Learning Academy.
- The majority of the scholarships and the scholarship money was paid in Maricopa County

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INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2004

Arizona's individual income tax credit for contributions to school tuition organizations, more commonly referred to as the private school tax credit, is governed by A.R.S. §43-1089. School tuition organizations (STOs) must report the following information to the Arizona Department of Revenue by February 28:

1. The name, address and contact name of the STO.
2. The number of contributions received in the previous calendar year.
3. The dollar amount of contributions received in the previous calendar year.
4. The number of children awarded scholarships or grants during the previous calendar year.
5. The dollar amount of scholarships and grants awarded during the previous calendar year.
6. The name and address of each school receiving the scholarships or grant money, along with the number and dollar amount of scholarships or grants provided to each school.

The Arizona Department of Revenue is aware of 55 STOs operating in Arizona in 2004, up from 51 in 2003. Two STOs[1] have failed to provide any information. These STOs have been contacted by telephone and/or letter requesting the required

[1] Arizona Scholarships and Grants Organization and Investing in Children of Arizona Scholarship Fund

information. (There is no penalty in statute for failure to report.) Neither has indicated that the information required is forthcoming.

For those STOs that have reported, the number and amount of donations are set out in the following table. For calendar year 2004, $31.9 million has been reported by 53 STOs, an 8.2% increase over the donations reported for 2003. The largest STO, the Catholic Tuition Organization for the Diocese of Phoenix, reported $7.5 million in donations, 24% of the total. To review the donations reported by each STO, see Appendix I at the end of this report.

Calendar Year	# of STOs Reporting	# of Donations	Amount	% change in amount
2004	53	63,830	$31,871,900	8.2%
2003	51	58,122	$29,445,494	12.5%
2002	43	52,161	$26,171,191	5.0%
2001[2]	43	46,755	$24,924,650	40.8%
2000	36	38,249	$17,701,284	28.4%
1999	33	32,023	$13,781,341	
1998[3]	16	4,248	$1,816,799	

STOs reported $28.2 million in scholarships paid to 21,160 students in 2004, an average of $1,334 per scholarship. This is a 15% increase in total

[2] The maximum donation for taxpayers filing as married filing joint increased to $625 from $500.

[3] Activity in 1998 was artificially low due to a court case challenging the constitutionality of the credit based on separation of church and state. The credit was determined to be constitutional.

scholarships reported over calendar year 2003 and a 9.4% increase in the average scholarship. The following table shows the history of scholarships and grants paid out by STOs, based on information reported to the Department of Revenue. (In prior years, some STOs reported donations received but did not report scholarships paid out.) Average scholarship as shown in the table is calculated *only* for those STOs that reported *both* the number and amount of scholarships paid. (STOs that reported no scholarships paid out were not included in the count or in the averages.) The range of average scholarship amounts is from $280 (Dynamite Montessori Foundation) to $12,376 (New Way Learning Academy School Tuition Organization). To review the scholarships paid by each STO, see Appendix II at the end of this report.

Calendar Year	# of STOs Reporting	# of Scholarships	Amount	% chg in amount	Average scholarship	% chg in avg
2004	51	21,160	$28,233,972	15.0	$1,334	9.4
2003	49	20,138	$24,543,064	9.7	$1,219	6.6
2002	36	19,568	$22,368,753	37.3	$1,143	27.0
2001	32	18,100	$16,287,842	19.3	$900	1.4
2000	30	15,377	$13,653,685	465.3	$888	36.6
1999	17	3,713	$2,415,181	1686.8	$650	17.3
1998[4]	4	244	$135,170		$554	

STOs provided scholarships and grants to 334 private schools throughout Arizona. Arizona School Choice Trust provided scholarships and grants to

[4] Activity in 1998 was artificially low due to a court case. See Footnote 3.

132 schools, more schools than any other STO. Appendix III, at the end of this report, lists the number of schools to which each STO provided scholarships. That information is aggregated in the following table.

# of private schools	# of organizations giving to this number of private schools
1	3
2	10
3	10
4	3
5	4
6-10	9
11-20	6
25 or more	6

As shown above, three STOs gave scholarships to only one private school. Those three STOs are Educare Scholarship Fund, New Way Learning Academy School Tuition Organization and Patagonia Scholarship Fund.

One private school received scholarship/grant money from as many as nine different STOs. This private school was Northwest Christian School in Phoenix, receiving 650 scholarships for $843,100. The following table shows the number of STOs contributing scholarship/grant money to the private schools.

	# of private schools receiving scholarships or grants from:
One STO	160
Two STOs	75
Three STOs	47
Four STOs	24
Five STOs	21
Six STOs	1
Seven STOs	5
Nine STOs	1

In other words, 160 private schools received scholarship/grant money from only one STO. There were 75 private schools that received scholarship/grant money from two STOs.

The *smallest* average scholarship paid by an STO to one private school was $28 paid by Chaparral Mission Scholarship Fund to Navajo Trails in Winslow. The *highest* average scholarship paid by an STO to one private school was $12,376 paid by New Way Learning Academy School Tuition Organization to New Way Learning Academy.

The most scholarship/grant money received by one private school was $843,100 for 650 scholarships to Northwest Christian School in Phoenix. The scholarship/grant money came from nine different STOs, for an average of $1,297. Appendix IV lists the 334 private schools that received scholarship/grant money, the number of scholarships, the amount and the average scholarship. This table also shows the percent change in amount of scholarship money received and the percent change in the average

scholarship paid if the private school was reported as receiving scholarship money in 2003.

In terms of where the scholarship/grant money went within Arizona, the most money went to schools within the city of Phoenix. Slightly more than 31% of the scholarships went to 81 private schools in Phoenix and about 37% of the money. As would be expected, 65% of all scholarships granted were in Maricopa County and 69% of the money. These are the same percentages as in 2003. Appendix V shows the cities within which the scholarship/grant money was received, the average scholarship and the percent change from 2003.

APPENDIX I

SCHOOL TUITION ORGANIZATION	# of 2004 donations	2004 donations	% chg in #[5,6]	% chg in $
Alternative Schools Scholarship Fund	22	$10,825	37.5	40.1
Arizona Adventist Scholarships	644	$297,297	(4.5)	1.8
Arizona Christian School Tuition Organization	13,029	$6,971,741	6.6	7.2
Arizona Episcopal Schools Foundation	1,275	$611,819	13.3	10.9
Arizona Independent Schools Scholarship Foundation	1,093	$584,018	0.9	2.8
Arizona International Academy Scholarship Fund	67	$35,590	24.1	28.3
Arizona Lutheran Scholarship Organization	131	$68,262	4.0	12.6
Arizona Native Scholastic & Enrichment Resources	56	$26,875	(23.3)	(23.8)
Arizona Private Education Scholarship Fund	705	$382,280	(9.7)	(9.4)

[5] N/A indicates that the STO was not operational in the prior year OR they did not report.

[6] No percent change indicates that the STO was not operational in the prior year OR they did not report.

SCHOOL TUITION ORGANIZATION	# of 2004 donations	2004 donations	% chg in #[5,6]	% chg in $
Arizona Scholarship Fund	4,085	$2,176,217	31.0	35.2
Arizona School Choice Trust	4,218	$1,294,657	53.6	(6.6)
Arizona Tuition Organization	664	$362,251	N/A	N/A
Arizona Waldorf Scholarship Fund	189	$83,121	107.7	82.4
BEST Student Fund	326	$169,463	27.3	29.5
Bret Reed Freesmeyer Memorial Scholarship Fund	114	$64,791	2.7	6.5
Brophy Community Foundation	1,531	$827,614	(7.2)	2.4
Carden Schools Scholarship Fund	19	$7,650	0.0	(12.6)
Catholic Tuition Organization of the Diocese of Phoenix	14,191	$7,536,012	(0.5)	(0.2)
Catholic Tuition Organization for the Diocese of Tucson	7,268	$3,048,277	2.6	3.6
Chabad Tuition Organization	240	$101,620	30.4	29.4
Chaparral Mission Scholarship Fund	223	$101,750	(3.0)	(4.4)
Cheder Scholarship Organization	786	$384,476	0.6	2.6
Christ Lutheran School Foundation	372	$192,251	0.0	(0.5)

SCHOOL TUITION ORGANIZATION	# of 2004 donations	2004 donations	% chg in #[5,6]	% chg in $
Christian Scholarship Fund of Arizona	910	$447,951	13.5	11.5
Classical Christian Scholarship Fund	102	$55,005	88.9	44.0
Cochise Christian School Tuition Organization	154	$90,202	25.2	30.9
Dynamite Montessori Foundation	20	$11,875	(13.0)	(8.7)
Educare Scholarship Fund	117	$59,750	(4.1)	(9.4)
Engelhardt/Pappas Foundation	478	$247,724	19.8	24.1
Flagstaff Christian Scholarship Fund	351	$155,256	4.2	8.0
Foundation for Lutherans Interested in Funding Education	77	$40,282	14.9	25.6
Foundation for Montessori Scholarships	75	$39,284	(11.8)	(4.9)
Higher Education for Lutheran Program	1,366	$710,783	5.9	5.2
Institute for Better Education	2,113	$1,100,360	7.6	7.9
Jewish Community Day School Scholarship Fund	2,327	$1,292,116	7.0	9.9

SCHOOL TUITION ORGANIZATION	# of 2004 donations	2004 donations	% chg in #[5,6]	% chg in $
Lutheran Education Foundation	390	$172,223	(21.7)	(21.7)
Montessori Centre School Tuition Organization	63	$33,935	23.5	20.2
Montessori Scholarship Organization	342	$165,568	51.3	32.2
New Way Learning Academy School Tuition Organization	278	$145,306	12.6	17.4
Northern Arizona Christian School Scholarship Fund	257	$118,775	7.5	9.1
Orme Primavera Schools Foundation	267	$139,929	9.0	10.6
Patagonia Scholarship Fund	31	$13,463	10.7	(5.7)
Prescott Christian School Scholarship Foundation	431	$210,562	4.9	7.8
School Tuition Association of Yuma	396	$211,190	10.0	10.2
Schools With Heart Foundation	375	$189,898	2.5	2.9
Shepherd of the Desert Education Program	180	$101,412	33.3	38.0
Southern Arizona Foundation for Education	392	$222,584	(11.5)	(2.1)

SCHOOL TUITION ORGANIZATION	# of 2004 donations	2004 donations	% chg in #[5,6]	% chg in $
Tempe Montessori's Parents Organization	218	$104,318	1.4	3.3
Tuition Organization for Private Schools	539	$286,959	N/A	N/A
Valley Lutheran Scholarship Organization	130	$58,908	N/A	N/A
VVBC Christian Education Fund	40	$22,385	0.0	2.2
White Mountain Tuition Support Foundation	20	$9,450	N/A	N/A
Yuma's Education Scholarship Fund for Kids	143	$75,595	70.2	56.1
TOTAL	**68,830**	**$31,871,900**	**9.8**	**8.2**

APPENDIX II

SCHOOL TUITION ORGANIZATION	# of 2004 scholarships	2004 scholarships	% chg in #[7,8]	% chg in $	Average scholarship	% chg in average
Alternative Schools Scholarship Fund	23	$9,742	53.3	48.5	$423.57	(3.2)
Arizona Adventist Scholarships	756	$290,713	(10.5)	(3.3)	$384.54	8.1
Arizona Christian School Tuition Organization	4,284	$6,142,055	9.0	15.8	$1,433.72	6.2
Arizona Episcopal Schools Foundation	124	$527,164	(5.3)	5.6	$4,251.32	11.6
Arizona Independent Schools Scholarship Foundation	92	$530,225	13.6	4.8	$5,763.32	(7.7)
Arizona International Academy Scholarship Fund	27	$25,350	(3.6)	19.6	$938.89	24.0
Arizona Lutheran Scholarship Organization	25	$47,079	(7.4)	(32.4)	$1,883.16	(27.0)

[7] No percent change indicates that the STO was not operational in the prior year OR they did not report.

[8] No percent change indicates that the STO was not operational in the prior year OR they did not report.

SCHOOL TUITION ORGANIZATION	# of 2004 scholarships	2004 scholarships	% chg in #	% chg in $	Average scholarship	% chg in average
Arizona Native Scholastic & Enrichment Resources	13	$24,550	(23.5)	(21.2)	$1,888.46	3.1
Arizona Private Education Scholarship Fund	263	$440,838	9.6	24.1	$1,676.19	13.2
Arizona Scholarship Fund	1,403	$1,576,701	37.0	34.6	$1,123.81	(1.7)
Arizona School Choice Trust	857	$1,339,673	41.7	46.9	$1,563.21	3.7
Arizona Tuition Organization	49	$34,081			$695.53	
Arizona Waldorf Scholarship Fund	58	$84,545	100.0	106.1	$1,457.67	3.1
BEST Student Fund	54	$136,878	35.0	13.9	$2,534.78	(15.6)
Bret Reed Freesmeyer Memorial Scholarship Fund	31	$61,710	(13.9)	0.9	$1,990.65	17.2
Brophy Community Foundation	345	$744,085	13.5	8.3	$2,156.77	(4.6)

SCHOOL TUITION ORGANI-ZATION	# of 2004 schol arships	2004 schol arships	% chg in #	% chg in $	Average schol arship	% chg in aver-age
Carden Schools Scholarship Fund	8	$8,675	14.3	91.7	$1,084.37	67.7
Catholic Tuition Organization of the Diocese of Phoenix	5,786	$7,603,559	(5.0)	16.9	$1,314.13	23.0
Catholic Tuition Support Organization for the Diocese of Tucson	2,627	$2,738,160	3.1	7.5	$1,042.31	4.2
Chabad Tuition Organization	27	$91,458	68.8	25.3	$3,387.33	(25.8)
Chaparral Mission Scholarship Fund	91	$104,358	(0.0)	0.0	$1,146.79	2.2
Cheder Scholarship Organization	67	$293,507	(21.2)	(1.3)	$4,380.70	25.2
Christ Lutheran School Foundation	58	$106,635	(4.9)	21.3	$1,838.53	27.6
Christian Scholarship Fund of Arizona	291	$348,507	9.0	4.4	$1,197.62	(4.2)

SCHOOL TUITION ORGANIZATION	# of 2004 scholarships	2004 scholarships	% chg in #'s	% chg in $	Average scholarship	% chg in average
Classical Christian Scholarship Fund	52	$62,145	1200.0	4354.8	$1,195.10	242.7
Cochise Christian School Tuition Organization	86	$91,611	30.3	134.3	$1,065.24	79.8
Dynamite Montessori Foundation	38	$10,647	18.8	(27.5)	$280.18	(38.9)
Educare Scholarship Fund	49	$49,425	(25.8)	(25.3)	$1,008.67	0.6
Engelhardt/ Pappas Foundation	40	$149,674	29.0	32.6	$3,741.85	2.7
Flagstaff Christian Scholarship Fund	104	$100,240	(1.0)	8.5	$963.85	9.5
Foundation for Lutherans Interested in Funding Education	49	$30,455	(5.8)	24.5	$621.53	32.2
Foundation for Montessori Scholarships	22	$37,242	29.4	13.1	$1,692.82	(12.6)
Higher Education for Lutheran Program	838	$672,695	1.7	5.0	$802.74	3.3
Institute for Better Education	902	$880,798	3.3	2.2	$976.49	(1.1)

SCHOOL TUITION ORGANIZATION	# of 2004 scholarships	2004 scholarships	% chg in #'s	% chg in $	Average scholarship	% chg in average
Jewish Community Day School Scholarship Fund	263	$1,115,374	19.0	16.3	$4,240.97	(2.2)
Lutheran Education Foundation	96	$203,206	(11.1)	(22.9)	$2,116.73	(13.2)
Montessori Centre School Tuition Organization	23	$30,705	(14.8)	8.9	$1,335.00	27.9
Montessori Scholarship Organization	102	$120,194	(6.4)	(9.6)	$1,178.37	(3.4)
New Way Learning Academy School Tuition Organization	9	$111,388	(18.2)	13.3	$12,376.44	38.5
Northern Arizona Christian School Scholarship Fund	139	$88,265	0.7	0.4	$635.00	(0.3)
Orme Primavera Schools Foundation	47	$119,001	(4.1)	(4.6)	$2,531.94	(0.5)
Patagonia Scholarship Fund	16	$13,000	(87.5)	(5.7)	$812.50	654.2

SCHOOL TUITION ORGANI-ZATION	# of 2004 schol-arships	2004 schol-arships	% chg in #[7,8]	% chg in $	Average schol-arship	% chg in aver-age
Prescott Christian School Scholarship Foundation	138	$180,471	3.8	(8.5)	$1,307.76	(11.8)
School Tuition Association of Yuma	191	$199,996	13.0	28.8	$1,047.10	14.0
Schools With Heart Foundation	63	$169,359	37.0	21.4	$2,688.24	(11.4)
Shepherd of the Desert Education Program	96	$68,942	43.3	22.5	$718.15	(14.5)
Southern Arizona Foundation for Education	253	$212,579	(7.7)	(12.5)	$840.23	(5.3)
Tempe Montessori's Parents Organization	57	$101,136	46.2	40.7	$1,774.32	(3.7)
Tuition Organization for Private Schools	56	$25,258			$451.04	
VVBC Christian Education Fund	10	$25,407	(9.1)	(7.4)	$2,540.70	1.9
Yuma's Education Scholarship Fund for Kids	62	$54,512	226.3	278.7	$879.23	16.1

SCHOOL TUITION ORGANI-ZATION	# of 2004 schol arships	2004 schol-arships	% chg in #[7,8]	% chg in $	Average schol-arship	% chg in aver-age
Total	21,160	$28,233,972	5.1	15.0	$1,334.31	9.5

APPENDIX III

SCHOOL TUITION ORGANIZATION	# of schools to which scholarships/grants were provided
Alternative Schools Scholarship Fund	2
Arizona Adventist Scholarships	17
Arizona Christian School Tuition Organization	100
Arizona Episcopal Schools Foundation	4
Arizona Independent Schools Scholarship Foundation	3
Arizona International Academy Scholarship Fund	5
Arizona Lutheran Scholarship Organization	2
Arizona Native Enrichment and Scholastic Resources	8
Arizona Private Education Scholarship Fund	20
Arizona Scholarship Fund	104
Arizona School Choice Trust	**132**
Arizona Tuition Organization	2
Arizona Waldorf Scholarship Fund	2
BEST Student Fund	2

SCHOOL TUITION ORGANIZATION	# of schools to which scholarships/grants were provided
Bret Reed Freesmeyer Memorial Scholarship Fund	5
Brophy Community Foundation	15
Carden Schools Scholarship Fund	3
Catholic Tuition Organization of the Diocese of Phoenix	36
Catholic Tuition Support Organization for the Diocese of Tucson	26
Chabad Tuition Organization	3
Chaparral Mission Scholarship Fund	3
Cheder Scholarship Organization	3
Christ Lutheran School Foundation	2
Christian Scholarship Fund of Arizona	16
Classical Christian Scholarship Fund	10
Cochise Christian School Tuition Organization	9
Dynamite Montessori Foundation	3
Educare Scholarship Fund	1

SCHOOL TUITION ORGANIZATION	# of schools to which scholarships/grants were provided
Engelhardt/Pappas Foundation	6
Flagstaff Christian Scholarship Fund	2
Foundation for Lutherans Interested in Funding Education	2
Foundation for Montessori Scholarships	5
Higher Education for Lutheran Program	13
Institute for Better Education	52
Jewish Community Day School Scholarship Fund	7
Lutheran Education Foundation	10
Montessori Centre School Tuition Organization	3
Montessori Scholarship Organization	8
New Way Learning Academy School Tuition Organization	1
Northern Arizona Christian School Scholarship Fund	3
Orme Primavera Schools Foundation	2

SCHOOL TUITION ORGANIZATION	# of schools to which scholarships/grants were provided
Patagonia Scholarship Fund	1
Prescott Christian School Scholarship Foundation	4
School Tuition Association of Yuma	8
Schools With Heart Foundation	3
Shepherd of the Desert Education Program	9
Southern Arizona Foundation for Education	4
Tempe Montessori's Parents Organization	3
Tuition Organization for Private Schools	11
VVBC Christian Education Fund	5
Yuma's Education Scholarship Fund for Kids	2

APPENDIX IV

School	# of Scholarships	Scholarship $	% chg from prior year	Avg. Scholarship	% chg from prior year
2nd Street Children's School	2	$5,828	N/A	$2,914	N/A
91st Psalms Christian School	40	$46,102	11.2	$1,153	19.6
A Child's View	2	$1,550	(40.4)	$775	(40.4)
Abbie Loveland Tuller	15	$38,492	(18.1)	$2,566	(18.1)
Abiding Savior School	2	$465	(90.2)	$233	(65.6)
Adobe Adventist Christian School	20	$8,287	(29.6)	$414	30.2
Ajo Calvary Christian Academy	2	$1,148	N/A	$574	N/A
Aldea Montessori	6	$5,938	100.0	$990	0.0
Alethea Classical Christian School	24	$10,644	(67.6)	$444	(55.4)
Al-Huda School	7	$28,000	(21.3)	$4,000	(10.1)
All Saint's Episcopal Day School	26	$191,835	1.1	$7,378	20.6
Alpha Omega Academy	13	$10,958	447.9	$843	(15.7)
American Indian Christian School	81	$83,631	3954.4	$1,032	(38.9)

School	# of Scholarships	Scholarship $	% chg from prior year	Avg. Scholarship	% chg from prior year
Apostolic Faith Center Christian Academy	10	$11,288	410.1	$1,129	53.0
Arcadia Christian School	26	$28,655	(16.4)	$1,102	6.1
Arizona International Academy	19	$16,738	(18.9)	$881	15.3
Arizona Lutheran Academy	125	$189,428	(4.7)	$1,515	3.7
Armstrong Academy	36	$44,536	(39.5)	$1,237	0.9
Arrowhead Christian Academy	71	$60,241	21.2	$848	0.7
Ascension Lutheran School	42	$50,330	N/A	$1,198	N/A
Atonement Lutheran High School	9	$13,989	184.7	$1,554	(36.8)
Avondale Montessori	2	$2,025	N/A	$1,013	N/A
Awakening Seed School	28	$51,553	96.8	$1,841	(15.7)
Beautiful Savior Academy	12	$11,455	(43.9)	$955	(11.2)
Berean Christian Academy	47	$72,503	130.6	$1,543	47.2

School	# of Scholarships	Scholarship $	% chg from prior year	Avg. Scholarship	% chg from prior year
Beth El Center for Early Childhood Education Kindergarten	4	$9,635	(59.7)	$2,409	(19.4)
Bethany Christian School (Lake Havasu)	5	$6,066	7.2	$1,213	7.2
Bethany Christian School (Tempe)	167	$237,193	2.6	$1,420	(9.1)
Bethany Learning Center	27	$34,615	16.6	$1,282	25.2
Blessed Sacrament Kindergarten	11	$33,539	26.8	$3,049	61.3
Bourgade Catholic High School	271	$469,461	32.2	$1,732	10.2
Brophy College Preparatory	168	$696,131	11.8	$4,144	7.8
Calvary Academy	66	$81,553	55.8	$1,236	(5.5)
Calvary Baptist School	6	$4,120	(45.6)	$687	18.0
Calvary Christian Academy	59	$50,827	140.4	$861	30.3
Camelback Christian School	1	$550	(82.3)	$550	(64.6)
Camelback Desert School	2	$6,000	100.0	$3,000	0.0

School	# of Scholarships	Scholarship $	% chg from prior year	Avg. Scholarship	% chg from prior year
Camp Verde United Christian School	71	$58,075	(6.5)	$818	(22.3)
Carden Christian Academy	20	$24,669	27.0	$1,233	52.4
Carden of the Peaks Academy	5	$7,025	92.5	$1,405	92.5
Casas Christian School	167	$248,350	4.5	$1,487	(2.4)
Castlehill Country Day School	62	$76,935	14.2	$1,241	1.4
Cathedral Christian Academy	117	$154,649	23.2	$1,322	1.1
Cathedral of Praise Christian School	3	$1,080	(62.7)	$360	(13.0)
Cave Creek Montesorri	1	$2,375	N/A	$2,375	N/A
Central Christian Academy	31	$33,166	(1.4)	$1,070	14.6
Chandler Christian School	74	$101,360	37.2	$1,370	39.1
Chapel in the Hills	29	$22,182	102.2	$765	32.6
Chinle Adventist Elementary	9	$3,081	N/A	$342	N/A

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Christ Greenfield Lutheran School	99	$147,807	60.4	$1,493	3.7
Christ Lutheran School	93	$139,963	41.1	$1,505	29.0
Christ the King Academy	8	$11,928	33.9	$1,491	17.1
Christ the King Catholic School	239	$169,038	10.3	$707	(8.2)
Christ the Redeemer Lutheran	44	$43,684	21.7	$993	54.9
Christian Academy of Prescott	68	$43,969	(54.0)	$647	(49.3)
Christ's Greenfield Lutheran School	2	$1,013	N/A	$507	N/A
Community Montessori School	8	$8,431	39.5	$1,054	92.0
Congregation Anshei Israel	3	$7,860	N/A	$2,620	N/A
Cornerstone Christian Academy (Cottonwood)	18	$14,702	(22.5)	$817	(22.5)
Cornerstone Christian Academy (Tucson)	131	$217,880	34.3	$1,663	7.6
Covenant Christian School	42	$6,214	188.4	$148	(31.5)

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Covenant Homeschool Resource Center	6	$2,553	929.4	$426	413.3
Crossroads Community School	93	$116,751	28.0	$1,255	(2.3)
Dayspring Kindergarten	40	$49,216	(15.7)	$1,230	(26.2)
Desert Christian Elementary	46	$41,580	N/A	$904	N/A
Desert Christian High School	169	$200,287	(34.6)	$1,185	(5.2)
Desert Christian Middle School	77	$99,968	4278.8	$1,298	127.3
Desert Garden Montessori	74	$77,853	39.0	$1,052	33.3
Desert Hills Christian Academy	3	$1,708	N/A	$569	N/A
Desert Springs Christian Kindergarten	25	$31,053	5.0	$1,242	26.0
Desert Sun Child Development Center	9	$16,711	21.4	$1,857	7.9
Desert Valley Christian School	86	$28,850	12.7	$335	(8.5)
Desert View Learning Center	14	$63,400	20.1	$4,529	(5.6)

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Desert Voices Oral Learning Center	8	$30,893	49.4	$3,862	(6.6)
Dobson Montessori School	94	$35,241	32.8	$375	33.0
Dove Christian School	30	$34,577	11.0	$1,153	7.4
Dynamite Montesorri	36	$10,345	(29.5)	$287	(37.5)
Early Light Academy	3	$4,900	N/A	$1,633	N/A
East Fork Lutheran School	132	$36,265	24.2	$275	27.3
East Valley Christian Academy	4	$2,860	(37.8)	$715	24.3
East Valley Jewish Community Center Day School	25	$77,192	N/A	$3,088	N/A
El Dorado Grayhawk	13	$10,181	(38.9)	$783	(10.7)
Emmanuel Christian Academy	10	$8,582	90.9	$858	(23.7)
Emmanuel Lutheran School	79	$66,512	16.6	$842	10.6
Emmaus Lutheran School	67	$54,107	12.1	$808	(4.6)
Enchanted Desert School	48	$67,910	68.0	$1,415	(5.5)

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Experimental Schools Corp of AZ	22	$7,794	N/A	$354	N/A
Faith Christian School	37	$50,832	(8.5)	$1,374	(6.1)
Faith Community Academy	26	$31,560	25.6	$1,214	25.5
Faith Evangelical Lutheran School	1	$1,050	(55.9)	$1,050	(55.9)
Faith Lutheran School	75	$62,550	N/A	$834	N/A
Family Life Academy	2	$2,138	N/A	$1,069	N/A
Family of Christ Child Development Center	8	$9,803	277.0	$1,225	88.5
Firm Foundations	12	$6,256	273.9	$521	118.0
First Baptist Christian Academy	38	$43,222	(11.8)	$1,137	(7.2)
Firs Baptist Christian School (Tucson)	4	$450	N/A	$113	N/A
First Baptist Christian School (Willcox)	22	$13,134	27.5	$597	33.3
First Southern Christian School	53	$58,058	18.6	$1,095	43.1

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Flagstaff Adventist School	36	$7,486	(9.1)	$208	(14.0)
Florence Baptist Academy	4	$1,125	N/A	$281	N/A
Fountain of Life Lutheran School	136	$107,232	1283.3	$788	(39.0)
Freedom Christian Academy	1	$2,625	N/A	$2,625	N/A
Gan Yeladeem	3	$5,000	N/A	$1,667	N/A
Gateway Baptist Academy	3	$1,125	N/A	$375	N/A
Gateway Bible Church Christian Training Center	4	$1,415	96.5	$354	(1.7)
Gateway Independent School	10	$16,635	N/A	$1,664	N/A
Gethsemane Lutheran School	65	$75,586	(1.5)	$1,163	(7.6)
Gilson Wash Baptist School	2	$563	N/A	$281	N/A
Glendale Christian Academy	52	$59,970	68.6	$1,153	20.0
Glenview Adventist School	85	$29,947	(22.7)	$352	(31.8)
Good Earth Montessori	3	$3,943	N/A	$1,314	N/A

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Good Shepherd Lutheran School	24	$12,017	(37.2)	$501	(24.1)
Good Steps Christian School	4	$1,530	72.3	$383	(56.9)
Grace Chapel Christian School	5	$2,691	34.7	$538	(19.2)
Grace Community Christian School	310	$530,171	10.2	$1,710	16.2
Grace Fellowship Academy	10	$7,415	217.8	$742	90.7
Grace Lutheran School	97	$86,672	18.4	$894	31.9
Gray Education Program	2	$13,345	99.5	$6,673	(0.2)
Green Fields Country Day School	32	$164,484	6.5	$5,140	(20.1)
Guiding Light School	29	$32,338	(8.5)	$1,115	(36.9)
Happy Trails School	5	$6,186	115.8	$1,237	29.5
Harvest Christian Academy	5	$6,198	(14.8)	$1,240	172.5
Heritage Christian Academy	101	$156,762	37.8	$1,552	2.3
Hermosa Montessori	5	$6,233	N/A	$1,247	N/A

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Holbrook Indian School	25	$3,995	(64.6)	$160	(33.3)
Holy Angel School	101	$86,952	(15.6)	$861	9.4
Holy Trinity Academy	7	$11,045	N/A	$1,578	N/A
Hopi Mission School	89	$90,250	9.7	$1,014	1.1
Immaculate Conception School	125	$63,250	2.5	$506	(8.2)
Immaculate Heart Academy	75	$129,210	32.6	$1,723	27.3
International School of Peace	1	$281	N/A	$281	N/A
International School of Arizona	11	$17,615	34.9	$1,601	22.7
Jess Schwartz Jewish Community High School	30	$193,925	43.6	$6,464	(4.3)
Jewish Community Center	5	$18,709	(35.5)	$3,742	54.8
Joy Community School	167	$348,963	18.2	$2,090	4.1
Keystone Montessori	5	$4,145	N/A	$829	N/A
Khalsa Montessori School	5	$11,612	1620.3	$2,322	244.0
Kids' Discovery Club Christian Kindergarten	2	$2,700	129.8	$1,350	129.6

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol arship	% chg from prior year
King David School	72	$318,299	3.2	$4,421	6.4
Kingman Adventist School	26	$10,912	57.0	$420	14.8
Kino Learning Center	13	$9,661	(81.8)	$743	(74.9)
Lamb's Gate Kindergarten	12	$7,130	(66.8)	$594	(53.0)
Lambs of God School	5	$9,088	N/A	$1,818	N/A
Latch School	5	$35,112	N/A	$7,022	N/A
Lestonnac Kindergarten	10	$9,395	33.7	$940	100.9
Light & Life Christian School	49	$63,071	12.2	$1,287	12.2
Lighthouse Academy	7	$5,785	20.0	$826	19.9
Loretto School	44	$52,912	(0.4)	$1,203	15.5
Lourdes Catholic School	56	$86,490	(17.1)	$1,544	(9.8)
Maricopa Village Christian School	24	$907	N/A	$38	N/A
Marina Montessori	1	$465	N/A	$465	N/A
Martin Luther School	98	$117,993	23.8	$1,204	(16.6)
Messiah Lutheran Open Arms	12	$3,600	N/A	$300	N/A
Mission Christian School	58	$58,485	86.5	$1,008	60.8

School	# of Schol-arships	Schol arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Montessori Center School	13	$20,380	(15.1)	$1,568	(28.1)
Montessori Children Centre	20	$27,667	N/A	$1,383	N/A
Montessori Children House	12	$22,520	25.6	$1,877	(5.8)
Montessori Day School	7	$11,445	(17.1)	$1,635	(17.0)
Montessori International	33	$55,624	0.9	$1,686	(5.2)
Montessori Kingdom of Learning	67	$79,927	(7.5)	$1,193	(6.1)
Montessori Learning Center	4	$4,313	31.5	$1,078	(34.3)
Montessori Schoolhouse Charter	30	$38,633	4216.5	$1,288	187.5
Montessori West Preparatory School	7	$7,113	(60.5)	$1,016	1.5
Most Holy Trinity Catholic School	163	$134,381	(3.3)	$824	26.2
Mount Calvary Lutheran School	35	$34,835	2.5	$995	(6.3)
Mountain View Lutheran School	8	$9,922	N/A	$1,240	N/A
Navajo Lutheran Mission School	25	$104,144	30.4	$4,166	19.1

School	# of Scholarships	Scholarship $	% chg from prior year	Avg. Scholarship	% chg from prior year
Navajo Trails	22	$613	N/A	$28	N/A
Nellie P. Covert School (Phoenix)	9	$1,584	N/A	$176	N/A
Nellie P. Covert School (Tucson)	4	$12,000	(66.7)	$3,000	0.0
New Hope Christian Academy	46	$33,465	(60.2)	$727	(34.3)
New Horizons Academy	2	$2,030	(16.5)	$1,015	25.3
New Vistas Academy	3	$4,114	56.7	$1,371	4.4
New Way Learning Academy	11	$118,567	17.9	$10,779	50.0
Noah's Ark Preschool & Kindergarten	2	$4,825	N/A	$2,413	N/A
North Phoenix Baptist Kindergarten	1	$360	N/A	$360	N/A
Northminster Christian School	13	$14,217	22.1	$1,094	12.8
Northwest Christian School	650	$843,100	12.5	$1,297	(2.6)
Notre Dame Preparatory	92	$281,563	138.2	$3,060	24.2
Orme School	23	$72,015	(6.1)	$3,131	6.1
Our Lady of Mount Carmel School	406	$257,973	20.3	$635	24.5

School	# of Scholarships	Scholarship $	% chg from prior year	Avg. Scholarship	% chg from prior year
Our Lady of Perpetual Help School (Glendale)	170	$241,288	16.1	$1,419	9.9
Our Lady of Perpetual Help School (Scottsdale)	451	$254,512	(2.4)	$564	5.0
Our Lady of Sorrows Academy	16	$16,650	N/A	$1,041	N/A
Our Lady of the Mountains	91	$110,418	12.7	$1,213	15.2
Our Mother of Sorrows	62	$91,405	9.0	$1,474	28.5
Our Savior Lutheran School (Bylas)	51	$6,133	116.7	$120	69.0
Our Saviour Lutheran School (Lake Havasu)	40	$17,305	5.0	$433	(0.2)
Page Christian School	4	$4,058	18.6	$1,014	18.5
Palo Verde Christian School	78	$34,353	(38.7)	$440	(52.9)
Paradise for Tots Christian Kindergarten	3	$5,738	(44.8)	$1,913	28.8
Paradise Valley Christian	223	$299,721	57.9	$1,344	16.2
Pardes Jewish Day School	49	$174,038	(28.5)	$3,552	(19.7)
Patagonia Montessori Private School	16	$13,000	(2.2)	$813	607.0

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Payson Community Christian School	43	$47,583	24.0	$1,107	(13.4)
Peace Lutheran Church School	24	$12,240	20.7	$510	15.6
Pentecostal of Phoenix Christian Academy	5	$2,250	14.3	$480	(54.3)
Peridot Lutheran School	43	$4,847	16.0	$113	(16.3)
Phillips Christian School	5	$1,300	25.6	$260	0.4
Phoenix Christian Academy	12	$12,926	24.3	$1,077	3.6
Phoenix Christian Grade School	90	$139,554	11.1	$1,551	7.5
Phoenix Christian High School	2	$4,112	N/A	$2,056	N/A
Phoenix Christian Junior/Senior High	292	$474,985	15.8	$1,627	10.7
Phoenix Country Day School	32	$148,409	1.4	$4,638	(36.6)
Phoenix Hebrew Academy	93	$385,065	98.5	$4,140	(18.9)

School	# of Scholarships	Scholarship $	% chg from prior year	Avg. Scholarship	% chg from prior year
Phoenix Metro Islamic School	66	$159,128	37.8	$2,411	(10.2)
Phoenix Special Programs and Academies	4	$693	(50.1)	$173	12.3
Pilgrim Lutheran School	64	$48,039	(1.7)	$751	(15.5)
Pleasantview Christian Elementary School	2	$900	(65.2)	$450	(47.9)
Pope John XXIII Catholic School	282	$218,605	6.8	$775	(51.2)
Potter's House	9	$13,263	2255.8	$1,474	424.6
Prescott Adventist School	14	$3,538	(39.1)	$253	17.8
Primavera School	27	$49,012	(8.8)	$1,815	(8.8)
Providence Classical School	55	$73,235	8.4	$1,332	(13.2)
Pusch Ridge Christian Academy	208	$313,719	27.5	$1,508	(3.2)
Queen of Peace School	73	$125,381	51.1	$1,718	26.3
Rainbow Academy	28	$37,563	(12.0)	$1,342	66.5
Rancho Solano Private School	27	$60,119	13.4	$2,227	34.4

School	# of Scholarships	Scholarship $	% chg from prior year	Avg. Scholarship	% chg from prior year
Redeemer Christian Academy	34	$41,170	12.5	$1,211	(10.6)
Redeemer Lutheran School	89	$123,903	(1.0)	$1,392	10.1
Resurrection Lutheran Child Development Center	14	$48,500	51.6	$3,464	19.1
Risen Savior Lutheran School	24	$46,454	(36.5)	$1,936	(25.9)
River of Life Christian Academy	33	$20,990	139.6	$636	45.2
Sacred Heart School	251	$272,132	3.9	$1,084	(25.1)
Safford Adventist Christian School	8	$1,995	N/A	$249	N/A
Safford Christian School	19	$17,986	64.2	$947	3.7
Saguaro Hills Adventist Christian School	55	$22,999	(23.2)	$418	(2.3)
Saguaro Hills Christian School	42	$34,388	(6.2)	$819	(32.9)
Salpointe Catholic High School	251	$513,266	5.7	$2,045	(5.7)

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
San Miguel Catholic High School	24	$33,434	N/A	$1,393	N/A
San Xavier Indian School	146	$188,230	(2.8)	$1,289	(22.1)
Santa Cruz Catholic School	70	$103,646	5.4	$1,481	(18.7)
Satori	47	$56,757	(26.2)	$1,208	24.2
Scottsdale Christian Academy	509	$738,938	26.0	$1,452	9.2
Scottsdale United Methodist Kindergarten	3	$1,994	N/A	$665	N/A
Seton Catholic High School	153	$356,398	9.7	$2,329	(2.5)
Shepherd of the Desert Lutheran School	54	$44,258	16.5	$820	(7.2)
Sherwood Christian Academy	4	$2,807	(49.4)	$702	26.5
Shiloh Christian School	59	$43,509	23.8	$737	9.0
Show Low Adventist Christian School	5	$1,013	(33.4)	$203	(46.6)
Sonshine Christian School	5	$2,800	N/A	$560	N/A

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Southwest Christian School (Phoenix)	27	$32,689	52.0	$1,211	7.0
Southwest Christian School (Yuma)	78	$65,932	90.8	$845	24.6
SS Peter & Paul Catholic School	140	$125,376	(2.6)	$896	(6.0)
SS Simon & Jude Catholic School	175	$277,104	8.0	$1,583	(11.1)
St Agnes Catholic School	142	$190,398	7.6	$1,341	10.6
St Ambrose Catholic School	188	$149,252	12.2	$794	6.9
St Andrews Presbyterian Pre School & Kindergarten	40	$19,301	130.0	$483	(25.2)
St Anne's Little Flower School	92	$102,802	19.5	$1,117	11.7
St Anthony School	75	$80,255	33.8	$1,070	7.0
St Augustine High School	40	$84,290	321.5	$2,107	26.3
St Catherine of Siena School	100	$144,595	14.0	$1,446	7.2
St Charles Apache School	113	$153,963	18.0	$1,363	9.7
St Cyril's Catholic School (Phoenix)	3	$4,894	293.7	$1,631	31.2

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
St Cyril's Catholic School (Tucson)	65	$172,720	(0 5)	$2,657	83.6
St Daniel the Prophet School	79	$138,686	48.4	$1,756	18.3
St Elizabeth Ann Seton	62	$116,532	1267.7	$1,880	54.5
St Francis of Assisi School	43	$44,691	(11 4)	$1,039	(7.3)
St Francis Xavier Elementary School	361	$272,995	69.8	$756	49.4
St Gregory Catholic School	142	$214,820	21.3	$1,513	74.3
St Gregory College Prep	54	$261,145	16.3	$4,836	9.8
St James Preschool & Kindergarten	5	$4,988	N/A	$998	N/A
St Jerome K-8 School	83	$131,258	9.5	$1,581	14.8
St Joan of Arc School	14	$33,084	(4.7)	$2,363	29.3
St John Bosco School	256	$248,455	26.0	$971	29.5
St John the Evangelist	67	$156,761	3.9	$2,340	(0 8)
St John Vianney Catholic School	201	$301,009	3.4	$1,498	5.0
St Joseph's Catholic School	403	$103,687	(0 3)	$257	0 0
St Louis the King School	132	$162,768	36.4	$1,233	33.3

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
St Maria Goretti Kindergarten	23	$53,323	19.0	$2,318	(27.5)
St Mark's Methodist Pre-School	8	$8,200	78.6	$1,025	34.0
St Mark's Presbyterian Pre-School & Kindergarten	11	$21,910	31.2	$1,992	(16.5)
St Mary-Basha Catholic School	235	$260,785	5.2	$1,110	117.2
St Mary School	168	$158,376	13.8	$943	42.9
St Mary's High School	375	$762,315	46.7	$2,033	8.3
St Matthew School	111	$217,529	(12.2)	$1,960	25.1
St Maximilian Mary Kolbe School	4	$3,180	N/A	$795	N/A
St Michael's	363	$62,699	(38.9)	$173	(30.0)
St Michael's	105	$200,474	14.0	$1,909	(3.4)
St Odilia	13	$22,900	N/A	$1,762	N/A
St Paul Lutheran School	3	$5,960	32.4	$1,987	32.5
St Paul's Preparatory Academy	12	$129,833	9.7	$10,819	91.9
St Peter Mission School	130	$209,299	43.4	$1,610	61.0
St Theresa Catholic School	100	$207,043	20.5	$2,070	281.9
St Thomas Aquinas	148	$176,140	36.3	$1,190	(11.6)

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
St Thomas Lutheran School	6	$5,770	N/A	$962	N/A
St Thomas the Apostle School	269	$243,174	14.2	$904	6.1
St Timothy's Catholic Academy	188	$210,165	4.5	$1,118	(0.5)
St Vincent de Paul School	228	$236,738	11.5	$1,038	(14.5)
Stone Creek Christian Kindergarten	2	$1,013	73.2	$506	159.5
Summit School of Ahwatukee	39	$95,407	184.1	$2,446	23.8
Sun & Shield Christian Academy	18	$8,221	11.8	$457	(19.3)
Sun Valley Indian School	8	$8,400	(41.1)	$1,050	3.0
Sunrise Montessori School	10	$11,506	(21.2)	$1,150	(21.2)
Surrey Garden Christian School	230	$394,343	26.1	$1,715	4.2
Tempe Adventist Christian School	40	$15,744	(20.8)	$394	48.7
Tempe Christian School	27	$35,035	19.3	$1,298	6.0
Tempe Montessori School	28	$47,931	7.8	$1,712	(3.8)

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Tesseract School	13	$19,995	(28.3)	$1,538	(50.4)
The Beginning School	11	$8,406	(33.3)	$764	(27.2)
The Family School	24	$60,459	(3.9)	$2,519	0.1
The Palms Academy	47	$51,298	N/A	$1,091	N/A
Thunderbird Adventist Academy	187	$89,168	18.5	$477	3.2
Thunderbird Christian Elementary School	99	$46,135	(2.3)	$466	84.2
Tri-City Christian Academy	194	$233,178	8.3	$1,202	(4.5)
Trinity Christian School	47	$68,152	19.2	$1,450	(16.3)
Trinity Classical Christian Academy	48	$53,131	187.8	$1,107	55.9
Trinity Cooperative Preschool & Kindergarten	11	$10,717	0.1	$974	(27.2)
Trinity Lutheran	118	$115,162	84.3	$976	18.7
Trinity United Methodist Pre-School & Kindergarten	9	$9,450	0.0	$1,050	(33.3)

School	# of Schol-arships	Schol-arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Tucson Christian School	28	$14,403	(73.4)	$514	(13.5)
Tucson Community School	10	$14,760	65.5	$1,476	(0.7)
Tucson Hebrew	59	$266,938	2.4	$4,524	25.0
Tuller School	1	$324	N/A	$324	N/A
Turning Point	31	$49,291	52.5	$1,590	42.6
Valley Cathedral Christian School	6	$7,478	(91.1)	$1,246	13.0
Valley Child Care & Learning Center	1	$1,305	(27.5)	$1,305	(27.5)
Valley Christian High School	261	$642,149	16.7	$2,460	5.5
Valley Classical Christian School	72	$87,903	N/A	$1,221	N/A
Valley Lutheran High School	103	$120,913	(31.8)	$1,174	(32.5)
Valley of the Sun Jewish Community Center Kindergarten	4	$10,450	(59.0)	$2,613	2.5
Verde Valley Adventist School	22	$11,302	(8.6)	$514	(0.2)

School	# of Schol-arships	Schol arship $	% chg from prior year	Avg. Schol-arship	% chg from prior year
Verde Valley Christian School (Cottonwood)	107	$64,138	5.9	$599	10.7
Verde Valley School (Sedona)	6	$14,765	83.4	$2,461	114.0
Veritas Christian Community School	42	$45,262	(19.5)	$1,078	(4.2)
Ville de Marie Academy	71	$80,745	16.2	$1,137	30.8
Waldorf School of Tucson	1	$720	N/A	$720	N/A
White Mountain Montessori	4	$5,020	241.5	$1,255	582.1
Wickenburg Christian Academy	11	$19,909	32.0	$1,810	32.0
Xavier College Preparatory High School	203	$491,442	15.5	$2,421	(4.4)
Yeshivah High School	11	$33,728	49.9	$3,066	(4.6)
Yuma Adventist School	24	$11,383	19.3	$474	(15.5)
Yuma Catholic High School	106	$221,533	20.4	$2,090	(26.2)
Yuma Lutheran High School	120	$123,396	4.7	$1,028	0.4

APPENDIX V

City/Town	# of Schol-arships	Schol-arship $	% chg from 2003	Avg. Schol-arship	% chg from 2003
Ajo	2	$1,148	N/A	$574	N/A
Apache Junction	12	$12,782	178.1	$1,065	85.2
Arizona City	1	$2,625	N/A	$2,625	N/A
Avondale	148	$176,140	36.3	$1,190	(11.6)
Bapchule	130	$209,299	43.4	$1,610	61.0
Benson	5	$2,691	34.7	$538	(19.2)
Buckeye	10	$7,415	217.8	$742	90.7
Bylas	51	$6,133	116.7	$120	69.6
Camp Verde	99	$95,638	(8.8)	$966	3.2
Casa Grande	75	$80,255	33.8	$1,070	7.0
Cave Creek	37	$12,720	(13.3)	$344	(25.1)
Chandler	879	$1,572,723	10.8	$1,789	34.4
Chinle	9	$3,081	N/A	$342	N/A
Chino Valley	47	$68,152	19.7	$1,450	(18.5)
Cottonwood	152	$91,442	(1.6)	$602	2.4
Douglas	54	$62,307	3.6	$1,154	26.7
Flagstaff	270	$221,992	12.3	$822	28.0
Florence	4	$1,125	N/A	$281	N/A
Gilbert	527	$803,852	32.3	$1,525	4.9
Glendale	873	$1,193,177	25.5	$1,367	13.6
Globe	101	$86,952	(15.6)	$861	9.4
Goodyear	254	$358,077	17.0	$1,410	1.4
Holbrook	25	$3,995	(64.6)	$160	(33.3)
Kingman	36	$19,494	70.3	$542	8.8
Kykotsmovi	89	$90,250	9.7	$1,014	1.1
Lake Havasu City	104	$74,198	71.4	$713	23.6
Laveen	24	$907	N/A	$38	N/A
Litchfield Park	127	$124,300	54.4	$979	14.2
Marana	18	$8,221	11.8	$457	(19.3)
Mayer	23	$72,015	(2.3)	$3,131	6.1
Mesa	1,156	$1,201,685	39.4	$1,039	3.5
Nogales	312	$361,422	190.9	$1,158	24.0

City/Town	# of Schol-arships	Schol arship $	% chg from 2003	Avg. Schol-arship	% chg from 2003
Oro Valley	222	$362,219	1031.9	$1,632	(43.9)
Page	4	$4,058	18.6	$1,014	18.5
Paradise Valley	62	$238,354	(50.0)	$3,844	(20.9)
Patagonia	16	$13,000	1.6	$813	561.0
Payson	43	$48,583	24.0	$1,107	(13.4)
Peoria	77	$91,215	3.0	$1,185	(5.0)
Peridot	43	$4,847	16.0	$113	(16.3)
Phoenix	6,593	$10,396,959	22.4	$1,577	15.3
Pinetop	4	$5,020	241.5	$1,255	582.1
Prescott	180	$179,666	(61.1)	$998	(34.9)
Rock Point	25	$104,144	30.4	$4,166	119.1
Safford	27	$19,981	82.4	$740	(18.9)
San Carlos	115	$154,526	18.4	$1,344	8.1
Scottsdale	1,441	$1,640,198	7.8	$1,138	5.7
Sedona	16	$31,400	290.1	$1,963	70.7
Show Low	86	$84,644	1638.5	$984	53.3
Sierra Vista	230	$242,411	1.7	$1,054	3.9
Sonoita	5	$6,198	(14.8)	$1,240	172.5
St. Michael	363	$62,699	(38.5)	$173	(29.7)
Sun Valley	8	$8,400	(41.1)	$1,050	3.0
Tempe	1,329	$1,626,901	(2.7)	$1,224	8.7
Tucson	3,778	$5,000,044	6.5	$1,323	(1.0)
Whiteriver	132	$36,265	24.2	$275	27.3
Wickenburg	11	$19,909	32.0	$1,810	32.0
Willcox	29	$18,919	25.1	$652	29.4
Winslow	22	$613	206.5	$28	(86.0)
Yuma	502	$534,305	14.5	$1,064	(4.5)

No. 05-15754

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN M WINN, et al., Plaintiffs-Appellants, v. GALE GARRETT[1], et al., Defendants-Appellees.	On appeal from the United States District Court for the District of Arizona No. CIV-00-0287-PHX-EHC

BRIEF OF APPELLEE GALE GARRIOTT, DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE

Terry Goddard
Arizona Attorney General

Paula S. Bickett
Chief Counsel, Civil Appeals
1275 W. Washington Ave.
Phoenix, AZ 85007
(602) 542-3333

[1] This case was captioned *Winn* v. *Hibbs* in the district court. Mr. Garriott, the current Director of the Arizona Department of Revenue, is substituted for J. Elliot Hibbs under Rule 43 (c)(2) of the Federal Rules of Appellate Procedure.

ADDENDUM 1

[Graphic omitted] ALIS Online

Committee on Ways & Means 1/21/97
ARIZONA HOUSE OF REPRESENTATIVES

Forty-third Legislature - First Regular Session
COMMITTEE ON WAYS & MEANS
Minutes of Meeting Tuesday, January 21, 1997
House Hearing Room 1 - 8:30 a.m.

(Tape 1, Side A)

Chairman Groscost called the meeting to order at 8:40 a.m. and roll was called by the secretary.

Members Present

Mr. Burns Mr. Hanley Mr. Valadez

Ms. Daniels Mr. Hart Mr. McGibbon, Vice Chairman

Mr. Gardner Mr. Smith Mr. Groscost, Chairman

Members Absent

Mr. Cheuvront (excused)

Mr. Hamilton (excused)

Speakers Present

Page Patterson, Assistant Research Analyst, Ways & Means Committee

Susie Stevens, Attorney, Stevens & Leibo, representing the Arizona Library Association (ALA)

Christopher Cole, Maricopa County Librarian, Arizona Library Association (ALA)

Barb Dickerson, Director, State and Local Tax Issues, Arizona Library Association (ALA)

Sherrie Schmidt, Dean of University Libraries, Arizona State University (ASU); representing the Arizona Library Association (ALA)

Bobbi Sparrow, Government Analyst, Arizona School Boards Association (ASBA)

Bea Casey, Special Assistant to the Director and Legislative Liaison, Arizona Department of Revenue (ADOR)

Barry Wong, Member, House of Representatives

Melodie Jones, Majority Research Analyst, Ways & Means Committee

* * *

of school capital reform estimates a need for an additional $182 million.

Chairman Groscost asserted that one of the plans supported by ASBA would actually rob the rainy day fund. He questioned how ASBA can call itself responsible if it robs the fund with the knowledge that shortfall years will occur in the future. Ms. Sparrow explained that under one proposal, 25 percent of the rainy day fund will be available as a revolving fund for fast-growing school districts, and will be reimbursed at a later time.

Chairman Groscost stated that most of the "robbing" which occurs in Washington takes place under the guise of loans. Ms. Sparrow explained that a format was used in the 1970's which provided borrowing for fast-growing school districts and required eventual reimbursement. She noted that the same format is contained in the current proposal supported by ASBA, and will *require* that the rainy day fund be reimbursed. She noted that it is a "rainy day" for some school districts, and mentioned that during the most recent rainstorm, buckets were situated throughout her children's classrooms to collect leaks.

With regard to school capital reform, Mr. Hart expressed amazement that no one has considered the simple solution of dividing $7.9 billion, the amount spent annually for K-12 education, by the number of K-12 students.

Debra Brimhall, Member, House of Representatives, speaking in favor of H.B. 2197, said the media has done a good job of confusing the issue of capital finance.

Mr. Valadez said he does not want to see a personal income tax reduction at the expense of children who must dodge roof leaks in the classroom. Representative Brimhall said that property taxes should not be confused with income taxes. She added that education groups are shooting themselves in the foot by not supporting a reduction in personal income taxes. She suggested that because businesses pay a higher percentage in property taxes than homeowners, personal income tax cuts should be encouraged so that the amount which would have been paid as income tax can be used to boost expansion of the business community which pays property taxes.

Mr. McGibbon moved, seconded by Mr. Hart, that H.B. 2197 be returned with a do pass recommendation. The motion carried by a roll call vote of 7-2-0-2 (Attachment 8).

H.B. 2074 - private school tuition; tax credit - DO PASS AMENDED

Melodie Jones, Majority Research Analyst, Ways & Means Committee, said H.B. 2074 provides a tax credit for tuition or voluntary contributions made to a school tuition organization beginning in tax year 1998. She indicated that a tax credit may be claimed up to $500 for contributions made to a school tuition organization, and that tax credits exceeding the imposed taxes for that tax year may be carried forward up to five years. (For further details, see the Bill Summary included as Attachment 9.)

Ms. Jones mentioned that three amendments to H.B. 2074 have been prepared (Attachments 10, 11 and 12).

Mr. Smith inquired as to the additional amount of tuition which will be collected under H.B. 2074. Ms. Jones replied that estimates are not available; however, she noted that there are currently 36,000 children enrolled in private schools in Arizona.

Mr. Valadez asked if "qualified school" will include day care centers. Ms. Jones shared her assumption that H.B. 2074 applies strictly to K-12 education.

Bobbi Sparrow, Government Analyst, Arizona School Boards Association (ASBA), speaking in opposition, asserted that H.B. 2074 is unconstitutional because it will allow public funds to be used for private and parochial schools. Further, she estimated that a fiscal note attached to the measure could total $18 million. She urged Committee Members to oppose any education system which does not allow for public accountability.

Chairman Groscost said that at some point the State may choose to entice students away from public schools and into private schools for an expenditure of only $500 per student. He speculated that such transfers may very well be a welcome relief to public schools which are overcrowded.

Mark Anderson, Member, House of Representatives, and Prime Sponsor, said H.B. 2074 represents equal access for children of any income level. He

emphasized that, unlike the wealthy, the children of lower-income parents do not have access to a wide range of schooling options.

Representative Anderson urged Committee Members to support a measure which will provide parents with more options for selecting a school they feel will be most beneficial for their children.

In response to Mr. Hanley, Mr. Anderson stressed that tax credits are not unconstitutional because they would not send money directly to private schools. He mentioned that a JLBC estimate made during the previous year reflected a possible cost of $5.9 million, not including offsets.

Representative Anderson explained that if Mr. Smith were to donate $500 to a nonprofit tuition organization (as prescribed in the bill), he would receive a $500 tax credit, but his child enrolled in a private school may not necessarily benefit directly from the donation because the nonprofit organizations would distribute tuition scholarships on a first-come, first-served basis with a preference given to low-income families.

Mr. Smith expressed support for the concept of vouchers and asked if H.B. 2074 will interfere with Governor Symington's voucher proposal. Representative Anderson said that if the Governor's proposal is limited in scope, H.B. 2074 probably will not affect it adversely.

Chairman Groscost surmised that Mr. Smith is concerned that an individual might "double dip" into the voucher and scholarship programs.

(Tape 2, Side A)

Mr. Smith expressed concern that if it turns out to be lucrative to rake in scholarships and vouchers, "rinky dink" private schools will begin to pop up everywhere and freely hand out good grades to keep parents happy. He questioned how a child who attends an unaccountable school for several years will ever be able to recoup the years of lost education.

Representative Anderson stated his belief that the type of parents concerned enough to obtain a tuition scholarship to send their children to a better school would probably be very critical of their children's education and not waste the opportunity provided by a scholarship.

Mr. Smith asked if H.B. 2074 will provide transportation. Representative Anderson replied in the negative.

Edward J. Ryle, Monsignor, Arizona Catholic Conference, speaking in support, suggested H.B. 2074 be amended to include language about accreditation to ensure a quality education and discourage the emergence of "fly-by-night" schools.

Trent Franks, representing himself, speaking in favor, recognized the controversy which surrounds

the constitutionality and appropriateness of sending public monies to private schools. He asserted that H.B. 2074 differs dramatically from standard voucher programs because it is based on voluntarily contributions to a nonprofit tuition organization.

Mr. Franks shared his belief H.B. 2074 will provide various levels of accountability in that 501(c)(3) organizations have a fiduciary responsibility, parents will select schools they feel are of high quality, and charities will ensure that donations are passed intact to children in the form of scholarships.

Mr. Franks predicted that a scholarship program for private schools will encourage public schools to address parental concerns and better meet the educational needs of children.

Mr. Franks mentioned that the average yearly cost of educating a child is $5,000 for public school, and $2,500 for private school. He pointed out that for every child who transfers from a public school to a private school, the State will save nearly $2,500.

Chairman Groscost recognized the following individuals as being in support of H.B. 2074:

Sidney Hoff Hay, Arizonans for an Empowered Future

Tim Lawless, Vice President of Public Affairs, Arizona Chamber of Commerce

Mr. McGibbon moved, seconded by Mr. Smith, that H.B. 2074 be given a do pass recommendation.

Mr. McGibbon moved, seconded by Mr. Smith, that the 4-page Groscost amendment dated 1/20/97 (12:17 pm) (Attachment 10) be adopted.

Ms. Jones explained that the 4-page amendment corrects a drafting error by changing "43-1022" to "43-1021."

The motion carried by a majority voice vote.

Mr. McGibbon moved, seconded by Ms. Daniels, that the 3-line Groscost amendment dated 1/20/97 (2:37 pm) (Attachment 11) be adopted.

Chairman Groscost said the 3-line amendment inserts standard boiler plate language about nondiscrimination on the basis of race, sex, etc.

The motion carried by a majority voice vote.

Mr. McGibbon moved, seconded by Ms. Daniels, that the 12-line Groscost amendment dated 1/20/97 (5:25 pm) (Attachment 12) be adopted. The motion carried by a majority voice vote.

Mr. McGibbon moved, seconded by Ms. Daniels, that H.B. 2074, as amended, be returned with a do pass recommendation. The motion carried by a roll call vote of 6-0-0-5 (Attachment 13).

H.B. 2199 - commercial lease sales tax; royalties - DO PASS AMENDED

Jay Kaprosy, Intern, Ways & Means Committee, said that commercial leases and royalty agreements are often combined in the mining industry. He explained that H.B. 2199 will prevent the Arizona Department of Revenue (ADOR) from taxing royalties within commercial lease agreements as leases, and place a statute of limitations upon the acquisition of "past due taxes" retroactive to 1968.

David Martin, Deputy Director, Arizona Rock Products Association (ARPA), speaking in favor of H.B. 2199, said past due taxes have been very large and that because the commercial lease tax will be phased out by June of 1997, H.B. 2199 will provide a fix retrospectively.

David T. Cox, Tax Attorney, Arizona Rock Products Association (ARPA), offered to answer questions.

Chairman Groscost recognized Mike Anable, Deputy Land Commissioner with the Arizona State Land Department, as being in support of H.B. 2199.

Mr. McGibbon moved, seconded by Mr. Smith, that H.B. 2199 be given a do pass recommendation.

Mr. McGibbon moved, seconded by Ms. Daniels, that the 2-line Groscost amendment dated 1/20/97 (5:24 pm) (Attachment 14) be adopted. The motion carried by a majority voice vote.

Mr. McGibbon moved, seconded by Ms. Daniels, that H.B. 2199, as amended, be returned with a do pass recommendation. The motion carried by a roll call vote of 6-0-0-5 (Attachment 15).

H.B. 2221 - printing; tax incentives - HELD AFTER DISCUSSION

Jay Kaprosy, Intern, Ways & Means Committee, said H.B. 2221 defines "printing" as a commercial printing operation or a commercial publishing operation and includes job printing, engraving, embossing, copying and bookbinding. He said the measure further classifies a printing business alongside a small manufacturing business as a class 8 property for taxation purposes.

Mr. Smith inquired as to the impetus for H.B. 2221. Chairman Groscost expressed his understanding that the measure addresses taxation of ink and other items used in printing.

In answer to Ms. Daniels, Mr. Kaprosy indicated no knowledge of a fiscal note.

Bea Casey, Special Assistant to the Director and Legislative Liaison, Arizona Department of Revenue (ADOR), said she only just received a copy of H.B. 2221 and has not yet had an opportunity to review it. However, she speculated that the measure will have a very broad scope and have an impact on ink, chemicals, toner, magazine copiers, Kinko's Copiers, and other commercial printers.

Chairman Groscost stated his intention to hold H.B. 2221 and request a fiscal note.

Georganna Meyer, Chief Economist, Arizona Department of Revenue (ADOR), reported being very familiar with enterprise zones and speculated that the impact of H.B. 2221 will be very minimal because enterprise zone credit costs a very small amount.

Mark Bogart, Minority Research Analyst, Ways & Means Committee, pointed out that H.B. 2221 contains three tax exemptions which were not mentioned by the intern.

Chairman Groscost announced that H.B. 2221 will be held.

H.B. 2195 - luxury tax; ports of entry - DO PASS

Melodie Jones, Majority Research Analyst, Ways & Means Committee, said H.B. 2195 states that the Arizona Department of Revenue (ADOR) and the Arizona Department of Transportation (ADOT) may enter into an interagency agreement (IGA) for the purpose of carrying out luxury privilege tax provisions at Arizona ports of entry.

Mr. McGibbon asked what types of luxury items will be affected by H.B. 2195. Ms. Jones replied that cannabis, cigarettes and alcohol will be affected. She added that the intent of H.B. 2195 is to allow for seizure of unstamped cigarettes entering Arizona from Mexico.

Bea Casey, Special Assistant to the Director and Legislative Liaison, Arizona Department of Revenue (ADOR), said her agency requested H.B. 2195 in order to be in compliance with the luxury tax mandates, specifically with regard to the seizure of tobacco products at the ports of entry. She explained that only tobacco products will be affected, and emphasized that seizure will only occur if other enforcement mechanisms, such as voluntary surrender, are not possible.

Mr. McGibbon asked if individuals making a weekend "rum run" to Mexico will be subject to a luxury tax. Ms. Casey repeated that H.B. 2195 will only pertain to unstamped tobacco products under certain circumstances. For example, she explained that a large tobacco truck or a truck with a bill of lading would not be affected.

Mr. Hanley asked if smoke shops on Indian reservations would be impacted by H.B. 2195. Ms. Casey replied in the negative and explained that the measure will only pertain to port of entry seizures of unstamped tobacco products which do not have a bill of lading or are not destined for a location where a stamp will be affixed. She added that a vehicle en route to another state would not be stopped.

Mr. Gardner asked what would occur in the event unstamped marijuana is discovered by a port of entry. Ms. Casey replied that drug seizure falls within the jurisdiction of the Department of Public Safety (DPS).

Mr. Gardner asked what action would be taken in the event *stamped* marijuana is discovered by a port of entry.

Mr. McGibbon moved, seconded by Mr. Smith, that H.B. 2195 be returned with a do pass recommendation. The motion carried by a roll call vote of 8-0-0-3 (Attachment 16).

Without objection, the meeting was adjourned at 11:16 a.m.

Teresa Alvarez, Committee Secretary
taa Committee on Ways & Means 1/23/97 1/21/97

(Original minutes, attachments and tapes on file in the Office of the Chief Clerk. Copy of minutes with attachments on file with Chairman Groscost.)

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Committee on Education 01/29/97 ARIZONA HOUSE OF REPRESENTATIVES Forty-third Legislature - First Regular Session

COMMITTEE ON EDUCATION

Minutes of Meeting; Wednesday, January 29, 1997
House Hearing Room 1 - 8:30 a.m.

(Tape 1, Side A)

Chairman Schottel called the meeting to order at 8:44 a.m., and attendance was noted by the secretary.

Members Present

Mrs. Foster Mr. McGibbon Mrs. Pickens

Mr. Gardner Mr. McLendon Mr. Smith

Mrs. Gray Ms. Norris Mr. Horne, Vice Chairman

Mrs. Johnson Mr. Overton Mr. Schottel, Chairman

Mrs. Knaperek

Members Absent

Mr. Hanley (excused)

Speakers Present

Deborah Zipnick, Research Analyst, House of Representatives

Representative Mark Anderson, District 29

Barbara Robey, Director of Government Relations, Arizona School Boards Association (ASBA)

Bea Casey, Registered Lobbyist and Special Assistant to the Director, Arizona Department of Revenue

Trent Franks, representing himself

B. Kay Lybeck, Registered Lobbyist and President, Arizona Education Association (ADE)

Jaime A. Molera, Director of Policy and Federal Relations, Arizona Department of Education

Sandy Junck, Registered Lobbyist, Arizona School Risk Retention

(Chairman Schottel read the name of a person present to testify, but who did not speak, see Page 6)

Voie S. Coy, Ph.D., Executive Director, Arizona Interscholastic Association

Owen McGeehan, Registered Lobbyist, Arizona Families for Home Education

Bobbi Sparrow, Governmental Relations Analyst, Arizona School Boards Association (ASBA)

Dr. John Tavasi, Superintendent, Cottonwood/Oak Creek School District

(Chairman Schottel read the names of persons present to testify in support of the bill, but who did not speak, see Page 8)

Mike Smith, Registered Lobbyist, Arizona School Administrators

(Chairman Schottel read the name of a person present to testify in support of HB 2013, but who did not speak, see Page 8)

Guest List (Attachment 1)

CONSIDERATION OF BILLS

HB 2074 - private school tuition; tax credit - DO PASS AMENDED

Deborah Zipnick, Research Analyst, House of Representatives, explained that HB 2074 provides for a tax credit for the tuition or voluntary contributions to a school tuition organization beginning in tax year 1998. A tax credit may be claimed up to $500 for contributions made to a school tuition organization, and tax credits exceeding the imposed taxes for that tax year may be carried forward up to 5 years. Ms. Zipnick stated that the definition of a school tuition organization is a

charitable organization that provides at least 90 percent to its annual revenue for educational scholarships or tuition granted to children attending qualified schools. A qualified school is defined as a private primary or secondary school meeting Arizona requirements.

Representative Mark Anderson, District 29, explained that HB 2074 allows for a tax credit of up to $500 for contributions to a tuition scholarship organization, such as the Arizona School Choice Trust Fund. These organizations award scholarships to low-income children to attend the school of their choice. It is not a voucher program and not a direct payment to any private schools. It changes what is now a tax deduction to a tax credit, enhancing the ability of these organizations to raise funds and allowing more low-income children the opportunity to attend the school of their choice. Mr. Anderson referenced the Joint Legislative Budget Committee's (JLBC) Fiscal Note on HB 2074 (private school tuition; tax credit) from similar legislation in 1996 that did not pass, which estimates the revenue loss associated with the proposed tax credit to be $5.9 million (Attachment 2). One main concern of legislators this year is equalizing opportunities for Arizona's children; allowing the children in low-wealth districts to have the same opportunities as those in high-wealth districts. This bill allows children from low-income homes the opportunity to attend their school of choice.

Mrs. Pickens questioned if this represents an indirect way for public money through a tax credit to

go to private schools. Mr. Anderson said that he believes it is an encouragement and incentive for citizens to donate to an organization they believe in. He added that parochial schools are included.

In response to queries, Mr. Anderson stated that he believes the organizations award full and partial scholarships to low income students. He pointed out that 100 percent of the funds given as donations are used for scholarships, and the school tuition organization must give 90 percent of its funds directly to scholarships. According to HB 2074, the school tuition organization must be a 501 (c)(3) charitable organization that is tax exempt in order to receive donations.

Mr Smith addressed the middle-income children who also need scholarships to attend private schools. Mr. Anderson advised that he believes if HB 2074 passes, donations will increase to help more children. He pointed out that contributions cannot be individual or school specific or the organization's 503 (c)(3) status will be jeopardized.

Mr. Horne requested clarification on donations. Mr Anderson explained that donations cannot be made directly to a private school, only to a school tuition organization which sends children to the school of the parent's choice.

In response to query, Mr. Anderson advised that he believes an individual can set up an organization with a 501(c)(3) status. Mr. Horne opined that if the tax credit for $5.9 million is approved, the money

will go to private schools. If the $5.9 million remains revenue in the general fund, it can be put directly into public schools in low-income neighborhoods. Mr. Anderson said he believes it is a deduction of $5.9 million to the general fund, therefore it is not taking funds directly from public education.

Ms. Norris requested an explanation of the JLBC Fiscal Note (Attachment 2). Mr. Anderson said the estimate of $5.9 million loss in revenue was calculated for HB 2523 (voluntary tuition contributions tax credit), introduced in the Forty-second Legislature, Second Regular Session, which is virtually the same bill. Ms. Norris questioned the $5.9 million, stating that she believes the figure could be higher, possibly $18 million that will be deducted from the general fund. Mr. Anderson indicated that the Fiscal Note will need to be explained by JLBC staff.

Barbara Robey, Director of Government Relations, Arizona School Boards Association (ASBA), testified in opposition to HB 2074. Ms. Robey referenced a letter she distributed (Attachment 3). She said she believes it is possible for any of these private and parochial schools to set up 501(c)(3) organizations to receive monies that can then be applied to the tuition that any child is paying to that school, which is where the $18 million estimate was arrived at. ASBA views this legislation as another attempt to undermine the funding for the regular public schools. She stated that ASBA believes the emphasis of this year's legislative session should be on improving the public schools. She pointed out that

she believes there is no accountability provision in HB 2074, and there is a significant change from a tax deduction to a tax credit.

Mrs. Pickens, referencing Ms. Robey's letter (Attachment 3), asked if the calculations are based on the fact that the tax credit is the $500 limit, but not necessarily the scholarship limit. Ms. Robey said it is her understanding that the tax credit is the limit and can be carried over from year-year for up to 5 years.

Bea Casey, Registered Lobbyist and Special Assistant to the Director, Arizona Department of Revenue, was present to answer administrative or technical questions. In response to query, she stated that any person in the State of Arizona can donate $500 or more and receive a $500 tax credit, which represents a dollar-for-dollar "hit" on the general fund.

Trent Franks, representing himself, testified in support of HB 2074. He advised that one accountability mechanism of the legislation is that the primary directive in 501(c)(3) prohibits donations that will benefit relatives or the donors. He pointed out that those who solicit for nonprofit groups have found that people donate to the organizations they believe in. Receiving a tax credit advantage is only a small aspect of people's decision to donate monies. He said he believes JLBC calculated its figures by taking into consideration the fact that most of the tax credits are not used to their fullest potential. Mr. Franks assessed that the public school system

spends approximately $5,000 to educate each student. If a student leaves the public school, the public school system loses some revenue because of the tax credit, but also loses the distinct expenditure of $5,000. He opined that in the long run the revenue deduction in the general fund will be offset by the reduction in expenditure. The school tuition organizations give 100 percent of all contributions from the public to scholarships for children. He clarified that only partial scholarships are awarded, and the focus is entirely on low-income children. A large number of the parents receiving the partial scholarships are in the $7,000 - $10,000 per year income bracket and sacrifice to send their children to private schools. These types of parents are intrinsically involved in their children's education. He explained that partial scholarships are awarded due to a lack of funds, and also it is deliberate on the part of the organizations to only give partial scholarships to allow the parents to contribute. Mr. Franks indicated that one of the primary fundamental long-term purposes of the legislation is to improve the lot of low-income children.

Mrs. Foster asked who decides which school the child receiving the scholarship will attend. Mr. Franks indicated that the parents have that sole responsibility, and there are some qualifications that must be met by the private schools. He advised that the Arizona Choice School Trust Fund has approximately 200 children receiving scholarships with a waiting list of approximately 800. The average scholarship is $650 to $800. He explained that funds are limited, but HB 2074 may act as an

incentive for more donations to assist more children. At the present time, low-income children have no options.

Mr. McLendon asked Mr. Franks if he would support an amendment that will allow public school teachers to form a foundation and receive a tax credit for donations to low-income students in public schools. Mr. Franks advised that he would support a separate bill to that effect.

(Tape 1, Side B)

Mr. Franks stated that he believes all citizens do presently contribute dramatically to the public school system. This legislation represents an option to redirect some of the money that would go to the general fund to a charity fund. Mr. McLendon advised that he believes any money redirected from the public school system will be harmful that that system.

B. Kay Lybeck, Registered Lobbyist and President, Arizona Education Association (ADE), testified in opposition to HB 2074. She pointed out that low-income students in rural areas will not be able to take advantage of this legislation because they live in isolated areas. She stated that she believes legislation decreasing revenue to support the existing public school system, will not be supported by the public school teachers and employees.

Jaime A. Molera, Director of Policy and Federal Relations, Arizona Department of Education,

testified in support of HB 2074. He related that Superintendent Keegan is vehemently in favor of school choice. There is a fundamental need for the state school system to develop access for all children to receive an education that meets their needs. He pointed out that it is becoming impossible to develop a scenario that meets everyone's needs. It is imperative to develop a system flexible enough for people to determine the educational needs of the children in the community and begin to develop a system that meets those needs. Mr. Molera indicated that the purpose is not to see who will profit or benefit financially, but to design a system that is going to profit and benefit all children academically.

In response to query, Mr. Molera, replied that the inequities in the system must be the first priority before the legislature. There is a need to develop a system that has an adequate amount of money for every student, no matter where they live, so that all students have access to and all taxpayers contribute equally to that support. He stated that he believes where a child will be best served educationally is ultimately the parent's decision. Any solution reached by the legislature should not be the development of a system to meet the needs of a particular institution, but rather to meet the needs of students and families first. Mr. Molera stated that once an equitable system is developed, he does not believe the state should preclude the right of parents to choose their child's educational setting.

Mrs. Knaperek moved, seconded by Mr. Gardner, that HB 2074 receive a do pass recommendation.

Mr. Horne moved, seconded by Mrs. Knaperek, that the 4-page Schottel amendment (Attachment 4) to HB 2074 be adopted.

Chairman Schottel explained that the amendment (Attachment 4) corrects an amendment adopted in the Committee on Ways and Means.

Question was called for on Mr. Horne's motion that the 4-page Schottel amendment (Attachment 4), be adopted. The MOTION CARRIED.

Mrs. Knaperek moved, seconded by Mr. McGibbon, that HB 2074, as amended, receive a do pass recommendation. By a roll call vote of 8-5-0-1 (Attachment 5), the MOTION CARRIED.

HB 2047 - school safety program oversight committee - DO PASS AMENDED

Deborah Zipnick, Research Analyst, House of Representatives, explained that HB 2047 codifies a school safety program oversight committee in statute. The committee was established in 1991 to review plans submitted by applicants for participation in the program and to select the sites eligible for funding based on school safety needs. Public school districts may apply to participate in the school safety program by submitting a detailed

program proposal to the school safety program oversight committee, and the State Board of Education shall distribute funds to those school districts whose plans are approved by the committee.

Chairman Schottel asked Vice Chairman Horne to take the Chair.

Mr. Smith remarked that the bill is basically putting the Safety Program Oversight Committee in statute. The implementation of Proposition 102 has $2.5 million appropriated to the Arizona Department of Education to continue the safe school program. He advised that he has discussed the program with school principals and superintendents, who advise the program is very successful. Incidents at some schools have been reduced by 70 percent. He explained that in order for a school to become involved in the safety program it must submit a request for a police officer and/or a probation officer assigned to its school grounds. The Safety Program Oversight Committee determines if the school has a legitimate need, and if the funds are available, an enforcement officer or probation officer is assigned to that school. He added that most of the Phoenix Police Officers volunteer for this program, which represents a savings.

Mr. McLendon related that approximately 61 schools are presently taking part in the school safety program, and additional funding will allow expansion to all schools that have a need. He stated that he concurs with Mr. Smith that the program is a success.

In response to query, Ms. Zipnick replied that it does not include private schools.

Sandy Junck, Registered Lobbyist, Arizona School Risk Retention, testified in support of HB 2047.

* * *

[Graphic omitted] ALIS Online

ARIZONA STATE SENATE

43RD LEGISLATURE FIRST REGULAR SESSION

MINUTES OF COMMITTEE ON EDUCATION

DATE: Thurs., March 20, 1997 **TIME:** 9:00 a.m.
ROOM: SHR 3
CHAIRMAN: Senator Huppenthal
VICE CHAIRMAN: Senator Bowers
ANALYST: Martha Dorsey
COMMITTEE SECY: Alice Kloppel
INTERN: Stacey Morley

ATTENDANCE BILLS

Committee Members Pr Ab Ex Bill Number Disposition

Senator Bowers X H.B. 2074 DPA/SE

Senator Hartley X H.B. 2081 DPA

Senator Lopez X H.B. 2094 HELD

Senator Patterson X H.B. 2293 DPA

Senator Richardson, G. X H.B. 2297 DPA

Senator Soltero X H.B. 2474 DP

Senator Huppenthal, Ch. X

SPECIAL PRESENTATIONS

* * *

teachers regarding discipline in the classroom.

Gene Hutloff, citizen and Arizona teacher for 39 years, expressed support for the bill without amendments, relating his experience in the classroom and his concern that the problem of student discipline is getting worse. He argued for returning the focus of discipline to the teacher in the classroom and protecting students from having their learning disrupted by habitually unruly students. Mr. Hutloff emphasized that when a teacher speaks on matters of discipline, his or her word should be law.

Senator Huppenthal announced **Mike Smith, representing AZ School Administrators; Diane Bishop, Governor's Office; and Mary Kay Haviland, AZ Education Association,** were present in support of the bill.

Terry Forthun, AZ Federation of Teachers, expressed support for the bill without amendments because, he asserted, they are flawed. He did, however, express support for the second half of the Richardson amendment clarifying that students are not allowed to use physical force. Mr. Forthun expressed support for the establishment of a review committee for discipline problems which forbids review by the referring teacher, protecting the teacher from administrative intimidation. He emphasized that over time the proposed review

committee would develop expertise and a community reference base which should enhance fair and consistent decision making on referrals.

Mr. Forthun confirmed Senator Patterson's understanding that he supports the provision in the Huppenthal amendment which sets up a review committee, but opposes the provision in the Huppenthal amendment which requires a governing board to place the issue on its agenda for a vote.

Senator Richardson expressed his view that the referring teacher would know the situation best and could strongly advocate for the removal of a chronically disruptive student. He noted this was the basis on which he agreed to propose the amendment calling for a one-on-one conference between the teacher and principal and argued that formation of a review committee would add another layer of bureaucracy which would weaken the discipline in classrooms.

Mr. Forthun suggested that if a precedent has been set in a district to ignore disciplinary referrals, the referring teacher would be given the message that sending a student out of class would accomplish nothing.

Senator Richardson related that he has learned from teachers in districts where raises are few and far between and maintenance and operation funding is scarce, that they would prefer safety in the classroom to raises or additional funding.

Senator Huppenthal announced he would hold H.B. 2094 in order to reach consensus on amendments.

H.B. 2074 - private school tuition; tax credit - DO PASS AMENDED/SE

Julie Schwartz, Senate Intern, explained the strike-everything amendment to H.B. 2074 establishes an individual income tax credit of up to $500 for contributions to a charitable organization that distributes choice scholarships or tuition grants. She further explained the amendment allows an individual income tax credit of up to $200 for any fees paid by a taxpayer to a public school for the support of extracurricular activities.

Ms. Schwartz explained a verbal amendment, which was typed and distributed to members, would be necessary to move some language to Page 4, between lines 34 and 35, where it should be.

In response to Senator Hartley's comments, Ms. Schwartz confirmed there is no assurance her grandchildren, or her dependents, would be the recipient of a $500 donation she might make to a scholarship organization. In response to Senator Hartley's request to know the definition for "dependent," Ms. Schwartz confirmed this would be the same one used by the Internal Revenue Service.

In response to Senator Hartley's request to know the fiscal impact of the strike-everything amendment, Ms. Schwartz explained the fiscal impact is $4.5 million per year beginning FY 1998-1999 for the

donations and $3.9 million per year for the tax credit, totaling $8.4 million.

Former State Representative Trent Franks, representing himself, spoke in support of the bill and emphasized the importance of enhancing parental involvement in education, as it has proven to be one of the greatest forces for improvement, whether in public or private education. He emphasized the bill gives low-income parents an opportunity to access scholarships so their children can attend the schools of their choice.

Senator Hartley asked if Mr. Franks could tell her how many low-income families in Arizona file itemized tax returns. Mr. Franks indicated he could not, but emphasized the question presupposes a primary misunderstanding about the bill--that parents make donations on behalf of their children. He explained these charities are already in place and the bill allows anyone to receive a tax credit for their contributions to help low-income families, acknowledging that a tax credit would be useless to a low-income family. Mr. Franks also noted the bill reiterates Internal Revenue Code provisions which prohibit receiving a tax credit for a contribution to aid your own family.

In response to Senator Hartley's request to know how the bill would change current tax deductions for contributions to education programs, Mr. Franks explained contributors would now receive a tax credit, which represents a greater incentive, and not a tax deduction.

In response to Senator Hartley's suggestion the bill is just another voucher bill, Mr. Franks pointed out there are important distinctions. He noted a voucher comes from the public treasury, whereas contributions discussed in the bill come from private individuals and thus eliminate constitutional questions. Mr. Franks acknowledged, however, the effort is like vouchers in working to allow parental choice.

Senator Hartley emphasized the bill does cost the State, as it actually diverts $8.4 million from the General Fund which could be going into the public school system every year. Mr. Franks strongly disagreed and emphasized that for every child in a public setting, taxpayers pay between $4,000 to $5,000 per year, while scholarships for private schools save the General Fund $4,000 to $5,000 per student per year. He noted the U.S. Post Office responded to the competition presented by Federal Express and currently receives no taxpayer subsidy, funding its operations solely on the sale of stamps.

Senator Hartley suggested this presupposes that every child is currently in public school and would be leaving public school to seek out these tuition scholarships. She asserted that most students in private schools will remain there and the bill represents a loss of revenue to the State. Mr. Franks noted the impact will be revealed in a required report at the end of two years.

Senator Huppenthal announced **Gary Bae, AZ Department of Education** was present in support

of the bill. He further announced that **Mary Kay Haviland, AZ Education Association; Barbara Robey, AZ School Boards Association; and Donald Vance, AZ Association of Retired Persons,** were present in opposition to the bill.

Catherine Zandler, Legislative Assistant, AZ Catholic Conference, spoke in support of the strike-everything amendment to H.B. 2074 and suggested an amendment to provide for accreditation by the North Central Association of Schools and Colleges would ensure accountability in return for the tax credit.

Senator Hartley asked how many private schools in Arizona are certified by the Association. Ms. Zandler indicated she did not have the information with her but could provide it. She further noted that parochial schools account for about 35 percent of the public and private schools in Arizona which are accredited.

Senator Hartley suggested not many private schools outside the Diocesan schools which Ms. Zandler represents are accredited. Ms. Zandler expressed her understanding the larger private schools are accredited and indicated she would supply this information to the members.

Senator Hartley expressed concern that an amendment to require accreditation would narrow the tuition grants to a particular religion and expressed her objection to this.

Senator Bowers moved H.B. 2074 be returned with a DO PASS recommendation.

Senator Patterson moved the strike-everything amendment dated 3/19/97 at 8:53 a.m. be adopted.

Senator Bowers moved the following verbal amendment to the strike-everything amendment: Page 4, between lines 34 and 35, insert: "C. THE CREDIT ALLOWED BY THIS SECTION IS IN LIEU OF ANY DEDUCTION PURSUANT TO SECTION 170 OF THE INTERNAL REVENUE CODE AND TAKEN FOR STATE TAX PURPOSES." The motion CARRIED by a voice vote.

Senator Patterson moved the strike-everything amendment as amended be adopted. The motion CARRIED by a voice vote.

Senator Bowers moved H.B. 2074 be returned with a DO PASS AS AMENDED recommendation. The motion CARRIED by a roll call vote of 4-3-0. (Attachment #5)

Senator Huppenthal voted "aye," emphasizing the importance of providing market choices in education, especially for poor families. He also saluted former State Representative Trent Franks for his work on this effort.

Without objection, the meeting was adjourned at 11:05 a.m.

FILED
OCT 02 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; et al., Plaintiffs - Appellants, v. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue; et al., Defendants - Appellees.	No. 05-15754 D.C. No. CV-00-00287-EHC District of Arizona, Phoenix ORDER

Before: D.W. NELSON, REINHARDT, and FISHER, Circuit Judges.

The parties are directed to submit supplemental briefs in answer to the following question: Whether Appellant-Taxpayers have standing to bring suit in light of the Supreme Court's decision in *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006) and this court's subsequent decision in *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007)?

Appellants shall submit a brief, no longer than fifteen pages in length, within twenty-one days of the issuance of this order. Appellees shall submit an answering brief, no longer than fifteen pages in length, within ten days of the date the appellants' supplemental brief is filed. Appellants shall submit a reply brief, no longer than seven pages in length, within seven days of the date the appellees' answering brief is filed.

PETITIONER'S BRIEF

Nos. 09-987, 09-991

SUPREME COURT, U.S.
FILED
JUL 30 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL
TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

GALE GARRIOTT, in his official capacity as
Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

PETITIONER GALE GARRIOTT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Under Arizona Revised Statutes (A.R.S.) section 43-1089, individuals who contribute money to school tuition organizations (STOs) that provide scholarships to students wishing to attend private schools are entitled to an income tax credit. Respondents alleged that Section 1089's neutral language and the Legislature's stated secular purpose for enacting it were a pretense and that the tuition tax credit program had the primary effect of advancing religion because a majority of taxpayers who contributed to STOs chose to contribute to STOs that awarded scholarships to students attending religious schools. The question presented is the following:

Did the court of appeals err in holding that if most taxpayers who contributed to STOs contributed to STOs that awarded scholarships to students attending religious schools, Section 1089 has the purpose and effect of advancing religion in violation of the Establishment Clause even though Section 1089 is a neutral program of private choice on its face and the State does nothing to influence the taxpayers' or the STOs' choices?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is under review is as follows:

Petitioners are Defendant Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue and Defendant-Intervenor Arizona Christian School Tuition Organization (ACSTO). Defendants-Intervenors who are Respondents in support of the Petitioners are Arizona School Choice Trust and two parents of children who received scholarships from Arizona School Choice Trust, Glenn Dennard and Luis Moscoso (collectively "School Choice").

Respondents, who were Plaintiffs-Appellants below, are Arizona taxpayers, Kathleen M. Winn, Diane Wolfthal, Maurice Wolfthal, and Lynn Hoffman.

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OPINIONS BELOW

The court of appeals' opinion (Garriott Pet. App. 1a-46a) is reported at 562 F.3d 1002 (9th Cir. 2009). The court of appeals' order and opinions on denial of rehearing en banc (Garriott Pet. App. 64a-116a) are reported at 586 F.3d 649 (9th Cir. 2009). The district court's opinion granting Intervenors-Defendants School Choice's motion to dismiss (Garriott Pet. App. 47a-63a) is reported at 361 F. Supp. 2d 1117 (D. Ariz. 2005).

JURISDICTION

The court of appeals entered judgment on April 21, 2009. It denied Petitioner's timely petition for rehearing en banc on October 21, 2009. On January 15, 2010, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including February 18, 2010. Petitioners filed timely Petitions on February 18, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." Arizona Revised Statutes § 43-1089 (2009) is reproduced at Garriott Pet. App. 117a-120a.

In 2010, the Arizona Legislature enacted a minor change to A.R.S. § 43-1089. 2010 Ariz. Sess. Laws, ch. 188, § 1. Later in 2010, the Legislature enacted more substantial amendments to A.R.S. § 43-1089 and added A.R.S. §§ 43-1501 to -1505; these amended provisions go into effect December 31, 2010. 2010 Ariz. Sess. Laws, ch. 293, §§ 1, 2. The text of A.R.S. § 43-1089 as amended is set forth in the appendix to this brief. App. 1-17.

INTRODUCTION

In *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002), the Court reiterated that "neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing" do not violate the Establishment Clause. Arizona's private-school-tuition-tax-credit program is a neutral government program that provides tax credits to individuals who contribute to charitable organizations that provide scholarships to students who wish to attend private schools. The court of appeals therefore erred in holding that Respondents could prove that Section 1089 as applied has the purpose and effect of favoring religion. This Court should reverse because the court of appeals' erroneous construction of *Zelman* would invalidate not only Section 1089 but many other tax credit and deduction programs that allow taxpayers to choose to contribute to religious organizations.

STATEMENT OF THE CASE

A. Factual and Statutory Background.

For at least the last seventeen years, the Arizona Legislature has demonstrated its interest in expanding the options available to Arizona students. In 1993, the Legislature recognized that parents have the primary obligation and right to "choose education and training for the child," 1993 Ariz. Sess. Laws, ch. 83, § 1, and allowed parents to fulfill the requirements of mandatory school attendance by providing instruction at home, *id.* § 4 (codified at A.R.S. § 15-802). In 1994, the Legislature authorized the establishment of charter schools to provide "additional academic choices for parents and pupils." 1994 Ariz. Sess. Laws, 9th Spec. Sess., ch. 2, § 2 (codified at A.R.S. § 15-181(A)).[1] In 1995, the Legislature required Arizona school districts to establish open-enrollment policies so that, subject to classroom availability, students could attend any school located outside their school district without paying tuition. 1995 Ariz. Sess. Laws, ch. 1, § 5 (codified at A.R.S. § 15-816.01).

In 1997, the Arizona Legislature enacted the Arizona Tuition Tax Credit (Section 1089). 1997 Ariz. Sess. Laws, ch. 48, § 2 (originally codified at A.R.S.

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[1] As of October, 2009, there were 502 charter schools in Arizona providing parents with a multitude of different education choices. *See* Ariz. State Bd. for Charter Schs.: School Search, http://www.asbcs.az.gov/parent_resources/school_search.asp (last visited July 25, 2010).

§ 43-1087 and renumbered as § 43-1089).[2] Section 1089 allows taxpayers to reduce their state income tax liability by claiming a credit for the amounts that they have paid to a school tuition organization (STO). Any individual owing $500 or more in Arizona income taxes receives a credit against state tax liability by the amount, not to exceed $500, that he or she contributes to an STO. A.R.S. § 43-1089(A)(1) (2009). Since 2006, married couples may receive a credit of up to $1,000 for contributions to an STO. A.R.S. § 43-1089(A)(3) (2009).

An STO is a charitable organization that is exempt from federal taxation under 26 U.S.C. § 501(c)(3) of the Internal Revenue Code. A.R.S. § 43-1089(G)(3) (2009).[3] It must "allocate[ ] at least ninety percent of

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[2] The text of A.R.S. § 43-1089 (2009) is set forth at Garriott Pet. App. 117a-120a. In 2010, the Legislature amended Section 1089 and added A.R.S. §§ 43-1501-1505. 2010 Ariz. Sess. Laws, ch. 293, §§ 1, 2 at App. 1-17. Although the latest changes to Section 1089 affect the validity of some of Respondents' factual allegations, the amendments do not affect the core components of the program that Respondents alleged, and that the court of appeals found, violated the Establishment Clause.

[3] Under 26 U.S.C. § 501(c)(3), nonprofit organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes" are entitled to a corporate tax exemption. To be eligible for Section 501(c)(3) status, the organization must "establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization or persons controlled, directly or indirectly, by such private interests." 26 C.F.R. § 1.501(c)(3)-1(d)(ii.)

its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their choice" and it cannot limit its educational scholarships or grants to students of one school. *Id.*[4]

Originally, Section 1089 provided that a qualified school is a nongovernmental primary or secondary school that does not discriminate "on the basis of race, color, sex, handicap, familial status or national origin" and that satisfies Arizona's requirements for private schools. 1997 Ariz. Sess. Laws, ch. 48, § 2. The definition of qualified school now includes "a pre-school for handicapped students" and no longer prohibits discrimination based on sex. A.R.S. § 43-1089(G)(2) (2009).

In urging enactment of Section 1089, its primary sponsor explained that allowing a tax credit instead of a deduction would enhance the STOs' ability to

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[4] The 2010 amendments clarify that the phrase "to allow them to attend any qualified school of their choice" describes the purpose for STOs and not a limitation on STOs' ability to choose the schools for which they will provide scholarships. Thus, A.R.S. § 43-1503(A) (2010) provides that "[a] certified school tuition organization must be established to receive contributions from taxpayers for the purposes of income tax credits under Section 43-1089 and to pay educational scholarships or tuition grants to allow students to attend any qualified school of their choice." App. 11-12. And newly enacted A.R.S. § 43-1503(B)(2) provides that "[t]o be eligible for certification and retain certification, the school tuition organization: . . . shall not limit the availability of educational scholarships or tuition grants to only students of one school." *Id.* at 12.

raise funds, that the credit was "an encouragement and incentive for citizens to donate to an organization they believe in," and that the program would be consistent with one of the legislators' main concerns that year of "equalizing opportunities for Arizona's children; allowing the children in low-wealth districts to have the same opportunities as those in high-wealth districts." Joint Appendix (J.A.) 226, 227. In an earlier hearing on the bill that became Section 1089, the Chairman of the legislative hearing noted that the tax-credit program may encourage students to choose private schools over public schools, which would save the State money and relieve overcrowding in the public schools. *Id.* at 213. There are no statements in the legislative history that suggest any religious motivation. *Id.* at 209-246.

When it enacted Section 1089, the Legislature also provided a tax credit to individuals and married couples for contributions or payments to an Arizona public school for the support of the school's extracurricular activities or character-education programs. 1997 Ariz. Sess. Laws, ch. 48, § 3 (currently codified at A.R.S. § 43-1089.01). When the Legislature enacted Section 1089, Arizona law provided many other individual income tax credits. A.R.S. §§ 43-1071 to -1090.01 (1996) Arizona law also allowed deductions for contributions to religious organizations. *See* A.R.S. § 43-1042(A) (1996) (permitting taxpayers to take "the amount of itemized deductions allowable" under the Internal Revenue Code). And Arizona law provided a tax exemption for property "used or held

primarily for religious worship." A.R.S. § 42-271(A)(7) (1996). (This exemption is currently contained in A.R.S. § 42-11109(A).)

Shortly after the Legislature enacted Section 1089, eleven Arizona taxpayers brought a facial challenge directly in the Arizona Supreme Court, claiming that it violated the Establishment Clause and the Arizona Constitution. *Kotterman v. Killian,* 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 810, 921 (1999). The Arizona Supreme Court held that Section 1089 served the secular purpose of providing additional educational choice and encouraging quality private schools, which furthered the State's educational goals for all children and stimulated public schools "by relieving tax burdens and producing healthy competition." *Id.* at 611. Relying on *Mueller v. Allen*, 463 U.S. 388, 396 99 (1983), the court also held that Section 1089 did not have the principal effect of furthering religion because (1) the credit was one of many tax benefits that the state and the federal governments offer for contributions to charitable organizations, including those made directly to churches and religious schools; (2) the credit was available to a broad class of recipients – all taxpayers; and (3) private citizens – the taxpayers who chose to contribute to STOs and parents who chose to apply for scholarship aid – determined whether any money reached religious schools. *Kotterman*, 972 P.2d at 612-14.

After Section 1089 went into effect, the Arizona Department of Revenue prepared annual reports about the Section 1089 program and summarized the

data that it had received in prior years. (The Arizona Department of Revenue Reports on the Individual Income Tax Credit for Donations to Private School Tuition Organizations for 1998, 2003, and 2004 [Section 1089 Reports] are reproduced at J.A. 85 to 206; the Section 1089 Report for 2008 is reproduced at School Choice Pet. App. 208-236; the Section 1089 Report for 2009 is reproduced at App. 18-49.) The Section 1089 Reports show the fluctuations in donations, the STOs, and the private schools that receive donations, as well as the diversity of the STOs and the private schools that are involved in the Section 1089 program.

The number and aggregate amount of donations to STOs increased each year until 2009. App. 21-22. In 2009, there was an eight percent decrease in the total amount of donations – that is, from $55 million in 2008 to $51 million in 2009. *Id.* The number of STOs has also fluctuated from six in 1998, to as many as fifty-six in 2006, to fifty-three in 2009. *Id.* Most of the STOs reflect their mission in the name of their organization and the STOs' listing itself demonstrates the STOs' diversity. *See id.* at 30-31. For example, there are four STOs that include "Montessori" in their name, indicating that they provide scholarships to students attending Montessori schools. *Id.* The names of other STOs indicate their focus on parental choice (such as Arizona School Choice Trust), certain cities (such as Pinetop Tuition Support Organization), or certain religious schools (such as Higher Education for Lutheran Program). *Id.*; *see also* Brief of Amici

Curiae Jewish Tuition Organization and New Way Learning Academy in Support of Petitioners in *ACSTO v. Winn*, Nos. 09-987, 09-988, 09-991, at 14-17 (March, 2009) (describing the diversity of Arizona STOs and explaining that STOs must solicit contributions and persuade donors to contribute to their organization).

The relative size of the different STOs has also fluctuated. For example, in 1998, the three largest STOs as measured by the amount of contributions were Catholic Tuition Organization, Arizona Christian School Tuition Organization, and Brophy Community Foundation. J.A. at 89-91. In 2009, the third largest STO was the Arizona Scholarship Fund, which provided scholarships to students attending 171 different schools. App. 30, 35. And of the ten largest STOs in 2009, six have no apparent religious affiliation. App. 30-31. Of the fifty-three STOs listed in 2009, thirty have no apparent religious affiliation. *Id.*

The number of private schools with students who have received scholarships from the Section 1089 program also steadily increased until 2009, when the number decreased slightly from 373 private schools in 2008 to 370 in 2009. App. 19. The list of the private schools that have Section 1089 scholarship students includes a wide diversity of both secular and religious schools. App. 39-47.

In 2006, the Arizona Legislature enacted a corporate tax credit for contributions to STOs that give

scholarships to students in low- and middle-income families who transfer from public to private schools. 2006 Ariz. Sess. Laws, ch. 14, § 5 (codified at A.R.S. § 43-1183). The Arizona Court of Appeals held that this corporate-tuition-tax-credit program did not violate the Establishment Clause in *Green v. Garriott*, 212 P.3d 96 (Ariz. App. 2009), *review denied*. After the Arizona Supreme Court found a direct tuition grant program enabling disabled students and foster children to attend private schools invalid under the Arizona Constitution in *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009), the Legislature enacted a corporate tax credit program that gives a credit to corporations that contribute to STOs that give scholarships to disabled students and children in foster care. A.R.S. § 43-1184 (2010).

In September 2009, the Speaker of the Arizona House of Representatives established a five-member Ad Hoc Committee on Private School Tuition Tax Credit Review (Committee) to determine whether the Legislature should add measures to improve STOs' accountability and transparency. Ariz. H.R. Ad Hoc Comm. on Private Tuition Tax Credit Review on HB 2664, 49th Leg. 1 (April 29, 2010). The Committee made twenty-two recommendations that were encompassed in House Bill 2664. *Id.* The Legislature passed HB 2664; some of the significant amendments include the following:

- All STOs must apply to the Department of Revenue for certification, and the Department may not certify an STO if it (1) does not

allocate at least ninety percent of its annual revenue for scholarships, (2) limits the availability of scholarships to only one school, (3) awards scholarships based solely on donor recommendations, or (4) allows donors to designate student beneficiaries as a condition of any contribution, A.R.S. § 43-1503 (2010) (App. 11-12);

- STOs must consider the financial need of applicants and report the amount of scholarships awarded to students whose family income is below certain statutorily prescribed amounts, A.R.S. §§ 43-1503(D)(2), -1504(7) (2010) (App. 13-15);

- A tax credit is not allowed if the taxpayer designates a student beneficiary as a condition of the taxpayer's contribution to the STO or if the taxpayer agrees with other taxpayers to designate each taxpayer's contribution for the direct benefit of the other taxpayer's dependent, A.R.S. § 43-1089(F) (2010) (App. 6).

B. Proceedings Below.

In 2000, Respondents filed their complaint alleging that Section 1089 violates the Establishment Clause on its face and as applied. ACSTO Pet. App. 116a-128a. Demonstrating Respondents' understanding of Section 1089's language, they alleged as follows: "STOs must make tuition grants of State funds available to students at more than one non-public school. As long as they do so, STOs may (and most do)

restrict their grants to students attending religious schools." *Id.* at 119a. Respondents further alleged that "75% of the scholarship funds granted by STOs in 1998 were granted to students attending religious schools, and 79% of the schools receiving scholarships were religious schools." *Id.* at 122a. Respondents alleged that Section 1089 violates the First Amendment by authorizing STOs "to make tuition grants to students attending only religious schools or schools of only one religious denomination or to students of only one religion." *Id.* at 125a-126a. Respondents requested an injunction prohibiting Petitioner Garriott "from allowing taxpayers to utilize the tax credit authorized by A.R.S. § 43-1089 for payments made to STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion." *Id.* at 127a. Respondents also requested a declaration that Section 1089 violates the First and Fourteenth Amendments. *Id.*

The district court dismissed Respondents' complaint under the Tax Injunction Act for lack of federal subject-matter jurisdiction. *Winn v. Killian*, No. CV-00-00287-EHC (D. Ariz. Feb. 27, 2001). The court of appeals reversed and remanded. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), *reh'g denied*, 321 F.3d 911 (9th Cir. 2003). This Court affirmed the court of appeals' decision. *Hibbs v. Winn*, 542 U.S. 88 (2004).

On remand, Petitioner Garriott moved for judgment on the pleadings based on res judicata and

failure to state a claim and School Choice and ACSTO moved to dismiss based on standing, res judicata, and failure to state a claim. Garriott Pet. App. 52a. The district court granted School Choice's motion to dismiss, finding that the complaint did not state a claim under the Establishment Clause. *Id.* at 62a. The court found that Section 1089 was "part of a secular state policy to maximize parents' choices as to where they send their children to school." *Id.* at 54a (citing *Kotterman*, 972 P.2d at 611). It also found that because Section 1089 was a "program of 'true private choice,'" it did not implicate the Establishment Clause even though a majority of the donations thus far had ultimately gone to religious schools. *Id.* at 55a (quoting *Zelman*, 536 U.S. at 649).

On appeal, Respondents relied on the Department's Section 1089 Report for 2003 to assert that approximately thirty of the fifty-five STOs restricted scholarship awards to religious schools and that STOs that awarded scholarships to students attending religious schools awarded eighty-two percent of the scholarships awarded under Section 1089. Appellants' Opening Brief in No. 05-15754 at 7, 12. Respondents further asserted that religion-specific STOs awarded seventy-nine percent of the Section 1089 scholarships in 2004. *Id.* at 12.

A panel of the court of appeals reversed the district court's decision because Respondents' allegations were "sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause." Garriott Pet. App. 3a. Relying on *McCreary County v. ACLU*, 545 U.S.

844 (2005), the court held that Respondents' allegations that Section 1089 permitted STOs to provide scholarships only to students attending religious school would, "if accepted as true, leave open the possibility that plaintiffs could reveal the legislature's stated purpose in enacting Section 1089 to be a pretense." *Id.* at 20a.

The court also held that Section 1089 had the primary effect of advancing religion. *Id.* at 22a. The court rejected Petitioners' argument that the tax credit that Section 1089 permits is not constitutionally distinct from the tax exemptions and deductions to religious organizations that this Court has upheld because unlike deductions that encourage charitable giving, "Section 1089 . . . offers narrowly targeted, dollar-for-dollar tax credits designed to fully reimburse contributions to STOs, most of which restrict recipients' choices about how to use their scholarships." *Id.* at 25a-26a. The court determined that Section 1089 differed significantly in structure from the educational assistance programs that this Court has held to be programs of true private choice. *Id.* at 29a. It deduced this because the State does not provide aid directly to parents under Section 1089 but instead "the aid is mediated first through taxpayers, and then through private scholarship programs" and the taxpayers' choices to provide a majority of their contributions to religious STOs constrained parental choice. *Id.* at 29a. The court concluded that a reasonable observer would perceive Section 1089 as government support for the advancement of religion

because in Section 1089, the State had delegated to taxpayers "a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.'" *Id.* at 22a (quoting *Zelman*, 536 U.S. at 650).

Petitioners moved for rehearing en banc, which was denied. Garriott Pet. App. 65a.

Eight judges dissented from the denial of rehearing en banc because the panel decision could not be squared with this Court's mandate in *Zelman*. Garriott Pet. App. 87a-88a. The dissent disagreed with the panel's conclusion that Section 1089 had the effect of advancing religion because it determined that no reasonable observer informed about the Section 1089 program could conclude that the *government itself* had endorsed religion through the program, given the at least four levels of "private, individual choice" that separated the State from "any aid to religious organizations." *Id.* at 94a. Because "[t]he system Arizona created could just as easily have resulted in a total dearth of funding for religious organizations as opposed to the surfeit allegedly available," the dissent concluded that "[i]t simply cannot be, as the panel claims, that the 'scholarship *program* . . . skews aid in favor of religious schools.'" *Id.* at 96a (quoting *Winn*, 562 F.3d at 1013).

The dissent also disagreed with the panel's belief that *Zelman* supported its decision, concluding instead that the panel's decision relied on Justice Souter's dissent in *Zelman*. *Id.* at 97a-106a. The

dissent concluded that the panel had erred in failing to recognize that, like *Zelman*, this case involved constraints on access to private, secular options, and this Court had not found that such constraints unduly constrained parental choice. *Id.* at 101a. Instead, the dissent noted that "the Court said that the availability of a private secular education, 'in a particular area, at a particular time,' was irrelevant to the constitutional inquiry." *Id.* (quoting *Zelman*, 536 U.S. at 656-60). The dissent also found that the panel decision "directly conflicts with *Zelman*" because, in evaluating the constitutionality of the Section 1089 program, it looked only at the choices available within the program and ignored "the host of options available to Arizona parents." *Id.* at 105a-106a.

Finally, the dissent disagreed with the panel's holding that Respondents had alleged facts suggesting that Section 1089 was not enacted for a valid secular purpose. *Id.* at 111a-112a. The dissent rejected the panel's apparent assertion that *McCreary* supports a finding that "the very enactment of Section 1089 'bespoke' a religious purpose." *Id.* at 112a (quoting *Winn*, 562 F.3d at 1012). And it discredited the panel's reliance on the manner in which Section 1089 had been implemented to show that the stated secular purpose was a sham. *Id.* The dissent noted that the Respondents' allegation that "'in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools'" was not a result of faulty implementation; instead, "that result is apparent from the statute itself, which is satisfied

so long as STOs provide scholarships to two or more schools . . . , a fact that plaintiffs themselves recognize in their complaint." *Id.* at 113a (quoting *Winn*, 562 F.3d at 1012).

Petitioners Garriott (No. 09-991) and School Choice (No. 09-987) petitioned this Court to review the court of appeals' determination that Section 1089 violates the Establishment Clause, and Petitioner ACSTO (09-988) sought review of the court of appeals' determination that Respondent taxpayers have standing to bring an Establishment Clause challenge to Section 1089. The Court granted certiorari in Nos. 09-987 and 09-991 and consolidated the cases for argument. 78 U.S.L.W. 3687 (May 24, 2010).

SUMMARY OF ARGUMENT

The court of appeals held that Section 1089's private-school-tuition-tax-credit program had the purpose and effect of advancing religion because the State allowed taxpayers to donate to STOs that limit scholarships to religious schools and this would constrain parents' ability to choose a secular private school. Garriott Pet. App. 20a, 22a. The court erred in concluding that the Arizona Legislature could have had an improper religious motive for enacting Section 1089 because Section 1089's language, legislative history, and implementation reveal only secular purposes and there are no external signs that the Legislature had any religious motivation for enacting it. The court also erred in concluding that Section 1089

had the primary effect of advancing religion because its conclusion that the effect of a neutral program of private choice will be attributed to the State cannot be squared with this Court's decision in *Zelman*.

1. Section 1089's language is neutral; it does not mention religion. Its language, which provides an income tax credit to individuals and married couples who contribute to STOs that provide scholarships to students who attend private schools, supports several secular purposes. These purposes include furthering parents' ability to choose the appropriate education for their child and encouraging the continued health of private schools that educate some of the State's children, provide healthy competition to public schools, and relieve the State from the cost of educating the students who attend them.

Section 1089's legislative history reflects secular purposes that are consistent with its neutral language. These purposes include providing additional educational options to students in low- and middle-income families who might not be able to afford private schools without financial assistance and providing assistance to *all* parents who choose to send their children to private schools.

And Section 1089's implementation is consistent with its language that requires STOs to provide scholarships to two or more schools and therefore permits STOs to provide scholarships only to religious schools. This implementation does not suggest a religious purpose because the State is not involved in

the STOs' decisions concerning the schools that they will support.

Although the court of appeals noted that Section 1089's language was neutral and that its legislative history suggested a valid secular objective, it nonetheless accepted Respondents' argument that they could demonstrate that Section 1089's design and scope revealed that the stated legislative purpose was a sham. Garriott Petition App. 19a-20a. Because Respondents have not shown that any legislator, much less the entire legislative body, had an improper religious motive for enacting Section 1089, the court's holding is contrary to this Court's precedent. This Court has found the government's stated purpose to be a sham only when the challenged statute's text, legislative history, or implementation shows that it has tried to cover up obviously religious motives or when its actions can be explained only by a religious motivation. *See McCreary*, 545 U.S. at 845, 864-65. The court of appeals' holding is also directly contrary to this Court's admonition that it defers to the State's secular purpose when it can be determined from the statutory language. *See Mueller*, 463 U.S. at 394-95.

2.a. This Court's decisions "have drawn a consistent distinction between government programs that provided aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citations omitted). Section 1089 is a program of true private choice because any

state aid that reaches religious schools is separated by four levels of private, individual choice. In his dissent from the denial of rehearing en banc, Judge O'Scannlain aptly described the program: "First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally parents need to apply for a scholarship for their student." Garriott Pet. App. 94a. No objective observer would attribute the decisions of the private individuals who participate in the Section 1089 program to the State.

The court of appeals held that Section 1089 was not a "neutral program of private choice" because a majority of taxpayers who contributed to STOs chose to contribute to STOs that provided scholarships to religious schools, which in turn could constrain parental choice. Garriott Pet. App. at 23a. But in *Zelman*, this Court rejected the argument that the amount of indirect aid provided to religious schools in a given year either created the imprimatur of government endorsement of religion or indicated that the government program must be favoring religion. 536 U.S. at 656.

b. The court of appeals' decision also conflicts with *Zelman* because it focuses narrowly on the Section 1089 program in finding that a reasonable observer would believe that Section 1089 constrains parental choice and encourages parents to choose religious schools. Under *Zelman*, the court should

have determined if Section 1089 would be perceived as favoring religion when viewed by an objective observer who was aware of its full history and context and of all of the educational options available to Arizona parents and students. An objective observer who was familiar with Section 1089's history, Arizona's educational history of encouraging parental choice, and the host of educational options available to Arizona students would reasonably view Section 1089 as one aspect of a broader undertaking to provide Arizona students with a full spectrum of educational options.

The court of appeals also erred in concluding that the public would perceive that the State is endorsing religion when it permits taxpayers to contribute to any STO, including those that provide scholarships only to religious schools. Because Section 1089 is one of many tax benefits that are available to all taxpayers who contribute to charitable organizations and is indistinguishable from tax benefits that are provided directly to religious organizations, the public will not perceive that Section 1089 is fostering religion when it allows taxpayers to choose the organizations that will receive their donations.

ARGUMENT

I. Section 1089's Language, Legislative History, and Implementation Reflect Its Secular Purpose.

The court of appeals held that Respondents could prove that the Legislature was hiding its true motive if "in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools." (Garriott Pet. App. 19a.) The court of appeals erred because Section 1089's plain language permits STOs to provide scholarships "without limiting availability to only students of one school" and neither that language nor Section 1089's legislative history indicates that the Legislature had a religious motivation in enacting Section 1089. The court of appeals distorted this Court's secular-purpose inquiry by failing to give appropriate deference to the State's obvious secular purpose and allowing Respondents' claim that the Legislature had a religious motive to survive when they had alleged no objective facts to support this claim.

In evaluating a challenge to a statute under the Establishment Clause, the Court determines whether the legislature had a secular purpose for enacting it. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The reason for the inquiry is to ensure that the government does not act "with the ostensible and predominant purpose of advancing religion," because acting with a religious purpose "violates the central Establishment Clause value of official religious neutrality." *McCreary*, 545 U.S. at 845. To determine purpose, the

Court looks through the eyes of "an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute." *Id.* at 862 (internal quotation marks omitted). Here, Section 1089's language and legislative history reveal only secular purposes; there are no external signs of any religious motivation.

Section 1089's language is neutral; it does not mention religion. By providing an income tax credit to individuals and married couples who contribute to STOs that provide scholarships to students who attend private schools, its language supports several secular goals. As the district court correctly found, Section 1089 is "part of a secular state policy to maximize parents' choices as to where they send their children to school." Garriott Pet. App. 54a. In *Kotterman*, the Arizona Supreme Court found that in addition to furthering parental choice, Section 1089 furthered the State's valid interest in encouraging the continued health of private schools that educate some of the State's children and "serve to stimulate public schools by relieving tax burdens and producing healthy competition." 972 P.2d at 611 (relying on *Mueller v. Allen*, 463 U.S. at 395).

Section 1089's legislative history does not reflect a religious purpose either; it instead reflects secular purposes that are consistent with Section 1089's neutral language. These purposes include providing additional educational options to low- and middle-income students who might not be able to afford

private schools without financial assistance and providing assistance to *all* parents who choose to send their children to private schools.

Since at least 1993, the Legislature has demonstrated its interest in expanding the educational options available to Arizona students. *See, e.g.*, A.R.S. § 15-802 (permitting home schooling to all parents to choose their children's education); A.R.S. § 15-181(A) (establishing charter schools to provide "additional academic choices for parents and pupils"); A.R.S. § 15-816.01 (requiring school districts to establish open-enrollment policies to enable students to attend schools located outside of their school district). By encouraging donations to organizations that provide scholarships to students who attend private schools, Section 1089 assists parents who want to send their children to private schools instead of public schools.

In urging enactment of the tuition tax credit, the bill's primary sponsor explained that it allowed a tax credit for contributions to tuition scholarship organizations that award scholarships to low-income students and that allowing a credit instead of a deduction would enhance these organizations' ability to raise funds. J.A. 226. He also stated that the credit was "an encouragement and incentive for citizens to donate to an organization they believe in" and was consistent with one of the legislators' main concerns that year of "equalizing opportunities for Arizona's children; allowing the children in low-wealth districts to have the same opportunities as those in high-wealth districts." *Id.* at 226-27. And he noted that

middle-income children may also benefit from the program. *Id.* at 227.

Although Section 1089 supports parents' ability to choose private schools, its legislative history since its original enactment – which is consistent with its neutral language – shows that the Legislature did not intend to limit its benefits *only* to students who could not afford to attend private schools without a Section 1089 scholarship. After Section 1089 was in effect, the Legislature enacted the corporate tuition tax credit. 2006 Ariz. Sess. Laws, ch. 14, § 5 (codified at A.R.S. § 43-1183). Under this program, STOs may provide scholarships only to students who have previously attended public schools and whose "family income does not exceed one hundred eighty-five per cent of the income limit required to qualify a child for reduced price lunches under the national school lunch and child nutrition acts." A.R.S. § 43-1183(J), (K). Thus, the Legislature tailored the corporate-tuition-tax-credit program only to students who met the statutory financial criteria and who were not already attending a private school. In contrast, although it has amended Section 1089 many times, the Legislature has never required STOs to follow specified income criteria when awarding scholarships under Section 1089. *Compare* 1997 Ariz. Sess. Laws, ch. 48, § 2 *with* 2010 Ariz. Sess. Laws, ch. 293, §§ 1, 2 at App. 1-17. Instead, the Legislature allowed the STOs – which must be exempt from federal taxation under § 501(c)(3) – to determine the appropriate scholarship

criteria and to choose the schools to which they would award scholarships.[5]

Allowing charitable organizations to determine not only whom they will help but also the criteria for giving help is hardly a novel concept and certainly does not indicate a religious motive. And the Legislature recognized that allowing STOs to specify their mission would encourage more taxpayer contributions, which would enable more students to obtain scholarships. For example, if an STO awards scholarships to students who attend Montessori schools, it can attract contributions from parents, grandparents, and friends of children attending Montessori schools as well as from alumni of Montessori schools.

In practice, some STOs have provided scholarships only to students attending religious schools. *See* ACSTO Pet. App. 119a (Respondents allege that most

[5] Most recently, the Legislature amended Section 1089 to require STOs to consider their applicants' financial need and to report (1) the amount of scholarships awarded to students whose family income meets the economic eligibility requirements for free or reduced-price lunches under the national school and child nutrition acts and (2) the amount of scholarships awarded to students whose family income exceeds that threshold but does not exceed 185% of the economic eligibility requirements under those acts. A.R.S. §§ 43-1503(D), -1504(7) at App. 13-15. This amendment reflects the Legislature's intent that STOs continue to determine their scholarship criteria but to require STOs to report the income levels of their scholarship recipients, so that contributors can evaluate whether they are willing to contribute to STOs that do not provide scholarships to students from low-income families.

STOs limit their scholarships to students attending religious schools). But this Court has recognized that the government has a neutral purpose when it allows religious organizations to receive tax benefits as part of a neutral taxing scheme that neither favors one religion over another nor favors religious organizations over nonreligious organizations. *Walz v. Tax Comm'n*, 397 U.S. 664, 672 (1970) (upholding a property tax exemption to religious organizations, finding that "[t]he legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility").

Although Respondents alleged no facts demonstrating that the Legislature acted with a religious motive when it enacted Section 1089, the Ninth Circuit nevertheless held that they could prove that the Legislature's stated purpose was a sham based on their claim that Section 1089 did not further the Legislature's parental-choice objective. Garriott Pet. App. 18a-20a. That holding perverts this Court's secular purpose inquiry.

The Ninth Circuit acknowledged that Section 1089's language "[o]n its face . . . could have been interpreted to permit STOs to provide scholarships to a limited set of schools, so long as that set was greater than one." *Id.* at 4a-5a. Given that statutory language, the Legislature clearly intended to allow STOs to limit their scholarships to certain schools when it enacted Section 1089. The Ninth Circuit nonetheless found that the secular purpose of providing "Arizona students with equal access to a wide

range of schooling options" would be undermined if Section 1089 was interpreted to allow STOs to provide scholarships only to students attending certain religious schools. *Id* at 19a-20a. But this plain-language interpretation of Section 1089 does not suggest a primary purpose of favoring religion because the neutral language does not permit the State to favor religious schools over secular schools; instead, it allows STOs to choose the particular schools – whether religious or secular – that they will support by providing scholarships to students that attend those schools. The Ninth Circuit's finding must therefore be rejected because it is directly contrary to *Walz*, 397 U.S. at 672.

The court of appeals also accepted Respondents' argument that they could demonstrate that Section 1089's design and scope reveal the stated legislative purpose to be a sham. Garriott Pet. App. 19a-20a. This finding is wrong because Respondents have not shown that any legislator, much less the entire legislative body, had an improper religious motive. This Court has found the government's stated purpose to be a sham only when it tries to cover up obviously religious motives by adding a secondary secular objective or when its actions can be explained only by a religious motivation. *See McCreary*, 545 U.S. at 864-65 (explaining that purported secular purposes have been found to be a sham in cases where they turned out to be implausible or to be secondary to a religious motivation); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (rejecting

the district's professed secular purpose for its policy of electing a single student to recite a pre-game prayer where its history indicated that the district "intended to preserve the practice of prayer before football games").

The court of appeals also erred in suggesting that the primary sponsor's expressed purpose is the only valid secular purpose for Section 1089. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (O'Connor, J., plurality opinion) ("Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."). As noted above, both Section 1089's language and its legislative history demonstrate more than one secular purpose and neither demonstrates any religious purpose.

And the court of appeals erred in accepting Respondents' claim that Section 1089 does not further the secular purpose of encouraging parental choice. This Court has never required the State to prove that a facially neutral statute is narrowly tailored to meet only the expressed secular purpose. Instead, it has accorded substantial deference to the State's secular purpose, whether expressed in the statute or gleaned from the statutory language. *See Mueller*, 463 U.S. at 394-95 (Court will not attribute an unconstitutional motive to the States "when a plausible secular purpose for the state's program may be discerned

from the face of the statute"); *Lemon*, 403 U.S. at 613 (the "stated legislative intent must be accorded appropriate deference"); *see also Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (Court did not doubt the validity of the State's interest behind a statute that provided aid to private schools and income tax benefits to parents for private-school tuition expenses, which included "preserving a healthy and safe educational environment for all of its schoolchildren," "promoting pluralism and diversity among its public and nonpublic schools," and preventing an already overburdened public school system from suffering if "a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools").

In sum, Section 1089's language, legislative history, and implementation reveal only secular purposes, and there are no external signs that indicate that the Legislature had any religious motivation for enacting it. Therefore, the court of appeals erred in holding that Respondents could demonstrate that the Legislature's secular objectives were a sham. This Court should reverse.

II. Section 1089 Does Not Have the Effect of Advancing Religion.

The court of appeals held that Section 1089 had the primary effect of advancing religion because the State allowed taxpayers to donate to STOs that limit

scholarships to religious schools and parents who wanted to send their children to secular private schools would perceive that the State was favoring religion if the majority of the taxpayers donated to religious STOs. Garriott Pet. App. 44a-45a. That holding is wrong because it attributes the effect of private decisions to the State, fails to acknowledge all the options available to Arizona parents and students, and ignores the similarities between Section 1089 and other well-established federal and state tax benefits available to charitable organizations, including religious organizations. The court purported to rely on *Zelman*, but its holding is directly contrary to *Zelman* and this Court's other precedents.

A. Section 1089 Is a Neutral Program of Private Choice.

This Court's decisions "have drawn a consistent distinction between government programs that provided aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citations omitted). These programs of true private choice are permissible because "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not the government, whose role ends with the disbursement of benefits." *Id.* at 652.

Section 1089 is a program of true private choice. In his dissent from the denial of rehearing en banc, Judge O'Scannlain aptly described the program:

> First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally parents need to apply for a scholarship for their student. In every respect and at every level, these are purely private choices, not government policy. Under such circumstances, "government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment."

Garriott Pet. App. 94a-95a (quoting *Zelman*, 536 U.S. at 652-53).

The Ninth Circuit held that Section 1089 was not a "neutral program of private choice" because a majority of taxpayers who contributed to STOs chose to contribute to STOs that provided scholarships to religious schools, which in turn could constrain parental choice. Garriott Pet. App. at 23a. But in *Zelman*, this Court rejected the argument that the amount of indirect aid provided to religious schools in a given year either created the imprimatur of government endorsement of religion or indicated that the government program must be favoring religion. 536 U.S. at 656 (rejecting the notion that "Cleveland's preponderance of religiously affiliated

private schools" indicated that the "program itself must somehow discourage the participation of private nonreligious schools"); *id.* at 658 (rejecting the claim of respondents and Justice Souter that the fact that ninety-six percent of the scholarship recipients have enrolled in religious schools proves that parents lack genuine choice because "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school"); *see also Mueller*, 463 U.S. at 401 (stating that the Court "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

The yearly fluctuations in the number of religious STOs and the amounts contributed to them demonstrate the wisdom of this Court's approach in *Zelman* and *Mueller*. The court of appeals expressed concern because the three STOs that received the most contributions in 1998 had religious missions. Garriott Pet. App. 5a, 69a. In 2009, the third largest STO was the Arizona Scholarship Fund, which provided scholarships to students attending 171 different schools, and six of the ten largest STOs had no apparent religious affiliation. App. 30-31, 35. Under the court of appeals' analysis, a ruling on the

constitutionality of the program could vary depending on the year in which it was evaluated.[6] Instead, the inquiry must focus on whether the State is in any way influencing the private decision-making, and the answer to that inquiry is clearly no.

Further, any alleged limitations on parental choice resulting from the taxpayers' chosen beneficiaries under Section 1089 in any given year are not constitutionally distinct from the limitations inherent in the program that this Court upheld in *Zelman*. The parents who participated in the *Zelman* voucher program were limited by the schools that chose to participate in it. *See* 536 U.S. at 647 (noting that forty-six of the fifty-six private schools that participated in the program had a religious affiliation and that no public schools elected to participate). The Court refused to attribute constitutional significance to the percentage of religiously affiliated schools that chose to participate because "Cleveland's preponderance of religiously affiliated schools certainly did not

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[6] The court of appeals did not provide any guidance on what kind of numbers would be acceptable. If only ten percent of the donations were provided to religious STOs, would parents believe that the State was endorsing religion? Indeed, the Respondents alleged that allowing *any* money to go to a religious STO or to a religious school violated the Establishment Clause and asked the court to prohibit Petitioner Garriott from allowing a tax credit for contributions to an STO that provides scholarships to any religious school. ASCTO Pet. App. 125a-127a.

arise as a result of the program," noting that eighty-one percent of private schools in Ohio were religious schools. *Id.* at 656-57. The same is true for the Section 1089 program. The majority of private schools in Arizona are religious. *See Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting) (noting that at least seventy-two percent of Arizona's private schools were religious); *see also* U.S. Department of Education, *Characteristics of Private Schools in the United States: Results from the 2007-2008 Private School Universe Survey* 7 (March 2009), http://www.nces.ed.gov/pubs 2009/2009313.pdf (more than eighty percent of private school students in the United States in the 2007-2008 fiscal year were enrolled in schools that had a religious orientation or purpose).

Thus, the court of appeals' holding, which based a finding of unconstitutionality on the private choices of private individuals, is contrary to this Court's precedent. Instead, Section 1089 does not violate the Establishment Clause because "any 'skew[ing]' that occurs takes place because of private, not government action." Garriott Pet. App. 96a (quoting *Winn*, 562 F.3d at 1013).

B. No Objective Observer Familiar with Section 1089's History and Context Would Conclude that Arizona Has Endorsed Religious Education.

1. Section 1089 Does Not Encourage Parents to Choose Religious Schools.

The court of appeals' decision also conflicts with *Zelman* because it focuses narrowly on the Section 1089 program in finding that a reasonable observer would believe that Section 1089 constrains parental choice and encourages parents to choose religious schools. Under *Zelman*, the court should have determined if Section 1089 would be perceived as favoring religion when viewed by an objective observer who was aware of its full history and context and of all of the educational options available to Arizona parents and students. An objective observer who was familiar with Section 1089's history, Arizona's educational history of encouraging parental choice, and the host of educational options available to Arizona students would reasonably view Section 1089 as one aspect of a broader undertaking to provide Arizona students with a full spectrum of educational options.

In *Zelman*, the Court rejected the argument that the voucher program failed to "provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children":

> The Establishment Clause question is whether Ohio is coercing parents into sending their

> children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

536 U.S. at 655; *accord id.* at 672-73 (O'Connor, J., concurring) (noting that the lower court's decision was incorrect because it failed to consider all of the options available to the Cleveland school children, including community and magnet schools). Because the Cleveland schoolchildren enjoyed a range of educational choices, the Court found no Establishment Clause violation. 536 U.S. at 660.

Section 1089 is just one of a broad range of educational options that Arizona provides to its schoolchildren. In addition to the neighborhood public school, Arizona parents may enroll their child in any other district public school that is better suited to their child's needs. *See* A.R.S. § 15-816.01(A) (requiring school districts to allow enrollment by students who do not live in the district). Arizona parents may also choose from a vast array of charter schools. Charter schools provide an alternative to traditional public schools because they are established by private entities, A.R.S. § 15-101(3), and may offer "curriculum with an emphasis on a specific learning philosophy or style or certain subject areas such a mathematics, science, fine arts, performance arts or foreign language," A.R.S. § 15-183(E)(3). Arizona is viewed as the leading charter school state. *See* William Haft, *Charter*

Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest, 30 Ariz. St. L.J. 1023, 1060 n.214 (1998). As of October 2009, Arizona had 502 charter schools. *See* Ariz. State Bd. for Charter Schs.: School Search, http://www.asbcs.az.gov/parent_resources/school_search.asp. (last visited July 25, 2010).

Not only does Arizona provide a vast array of public school options, it also makes the public school option far more attractive from a financial standpoint. There is no tuition for an Arizona public school education, and the average per-pupil expenditure is $7,810 for district schools and $6,946 for charter schools. Tom Horne, Ariz. Dep't of Educ., *Superintendent's Annual Report for Fiscal Year 2008-2009*, Vol. 1, at 54 (2010), http://www.azed.gov/AnnualReport/AnnualReport2009/Vol1.pdf; *see also* Brief of Amici Curiae the Cato Institute and others in Support of Petitioners in *ACSTO v. Winn*, Nos. 09-987, 09-991 (March 2010) at 15 (noting that the average scholarship amount under Section 1089 is less than one-quarter of the per-pupil funding available for students attending charter schools and roughly one-fifth of the funding available to traditional public school students). And parents may receive an income tax credit for contributions to their child's school to pay for expenses related to extracurricular activities or character-education programs. A.R.S. § 43-1089.01 (2009) (providing a $200 credit for individuals and a $400 credit for married couples). Given these public school options, it is not surprising that only 4.5% of

Arizona students attended private schools in the 2007-2008 school year. *Compare* Arizona Department of Education, *Research and Evaluation Section, 2007-2008 Enrollment* (January 2008), http://www.azed.gov/researchpolicy/azenroll/2007-2008/OctEnroll2008countygrade.pdf (enrollment of 1,148,448 public school students) *with* U.S. Department of Education, *Characteristics of Private Schools in the United States: Results from the 2007-2008 Private School Universe Survey* 20 (March 2009), http://www.nces.ed.gov/pubs2009/2009313.pdf (enrollment of 51,590 private school students in Arizona).[7]

Finally, as Judge O'Scannlain correctly noted, "Section 1089 itself offers parents yet another alternative: they can create their own STO and solicit donations for use at secular private schools." Garriott Pet. App. 104a. If all the parents who want to increase the availability of scholarship funding for a particular private secular school donate to an STO that provides scholarships to that school, there will be more scholarship money available for students who attend that school. It is difficult to imagine that parents and private secular schools have not grasped this simple logic.

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[7] Arizona also has a permissive home-schooling policy, A.R.S. §§ 15-802, -803, and it supports private school scholarships through its corporate-tuition tax-credit programs, A.R.S. §§ 43-1183, -1184.

Because the court of appeals did not consider the range of educational options available to Arizona schoolchildren in finding that the Section 1089 program could have the effect of favoring religion, its opinion conflicts with *Zelman*. This Court should reverse.

2. Section 1089 Is Not a State Endorsement of Religion Because It Allows a Tax Credit for Contributions to Charitable Organizations that Provide Scholarships to Religious Schools.

The court of appeals also erred in concluding that the public would perceive allowing taxpayers to contribute to any STO, including those that provide scholarships only to religious schools, as an endorsement of religion. Because Section 1089 is one of many tax benefits that are available to all taxpayers who contribute to charitable organizations and is indistinguishable from tax benefits that are provided directly to religious organizations, the public will not perceive that Section 1089 is fostering religion when it allows taxpayers to choose the organizations that will receive their donations.

This Court has long recognized that property tax exemptions for religious organizations do not violate the Establishment Clause when the benefits are part of a neutral tax scheme that does not favor religion. *See Walz*, 397 U.S. at 673 (upholding New York's property tax exemption because it had not "singled

out one particular church or religious group or even churches as such; rather, it granted an exemption to all houses of religious worship within a broad class of property owned by nonprofit [and] quasi-public corporations"); *cf. Hernandez v. Comm'r*, 490 U.S. 680, 689 (1989) (noting that federal taxpayers have been allowed to deduct the amount of contributions to charitable, religious, and other eleemosynary institutions for over seventy years).

In *Mueller*, 463 U.S. 388, 390 (1983), this Court upheld a tax deduction for actual expenses incurred for tuition, textbooks, and transportation of dependents attending elementary or secondary schools. In finding that the deduction did not have the primary effect of advancing religion, the Court found it significant that the tax deduction was one of many deductions that Minnesota's tax scheme allowed and that the deduction was allowed to all parents, not just to parents of children who attended religious schools. *Id.* at 396-97.

In *Zelman*, Justice O'Connor explained why the Court's holding that the voucher program did not violate the Establishment Clause did not "mark[] a dramatic break from the past." 536 U.S. at 664 (O'Connor, J., concurring). She noted that the amount that would be spent on vouchers "pale[d] in comparison to the amount of funds that federal, state, and local governments already provided religious institutions" by granting them well-established tax deductions, credits, and exemptions. *Id.* at 665 (O'Connor J., concurring). And Justice O'Connor noted that "tax

exemptions have 'much the same effect as [cash grants] . . . of the amount of the tax avoided.'" *Id.* at 666 (O'Connor, J., concurring) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (alteration in original).

Section 1089 easily passes Establishment Clause scrutiny under *Walz* and *Mueller*. Section 1089 is one of many individual income tax credits permitted under Arizona law. *See* A.R.S. §§ 43-1071 to -1090.01). (2009). These credits include a credit for cash contributions to qualifying charitable organizations – which include religious organizations – that provide services to low-income residents or chronically ill or physically disabled children, A.R.S. § 43-1088 (2009); for contributions or payments to an Arizona public school for the support of the school's extracurricular activities or character-education programs, A.R.S. § 43-1089.01 (2009); and for the donation of real property and improvements to a public school, A.R.S. § 43-1089.02 (2009). Arizona law also allows many deductions, including one for contributions to religious organizations. *See* A.R.S. § 43-1042(A) (2009) (permitting taxpayers to take "the amount of itemized deductions allowable" under the Internal Revenue Code). And Arizona law provides many tax exemptions, including one for property "used or held primarily for religious worship." A.R.S. § 42-11109. Accordingly, the Arizona Supreme Court correctly concluded that "the Arizona tuition tax credit is one of an extensive assortment of tax-saving mechanisms available as part of a 'genuine system of tax laws.'"

Kotterman, 972 P.2d at 613 (quoting *Mueller*, 463 U.S. at 396 n.6).

And like the program upheld in *Mueller*, Section 1089 benefits a broad class of recipients. All taxpayers who choose to contribute to an STO receive a tax benefit, and all parents whose children receive scholarships receive financial assistance for private school tuition.

Although the court below acknowledged that this Court has upheld other "tax benefits to individuals who contribute to nonprofit, religious institutions," Garriott Pet. App. 24a, it found Section 1089 constitutionally distinct from other tax deductions and exemptions (and thus, a delegation of governmental authority) because it "offers narrowly targeted, dollar-for-dollar tax credits designed to fully reimburse contributions to STOs" and its secular objectives are different "from those advanced by tax programs the Supreme Court has upheld." *Id.* at 25a-26a. The court erred because the distinction between a credit and a deduction does not alter the outcome of the Establishment Clause analysis and Section 1089's purpose is not substantially different from the secular purposes for other tax benefits that this Court has upheld.

This Court has noted that "a tax exemption has much the same effect as a cash grant to the organization of the amount that the organization would have to pay on its income." *Regan*, 461 U.S. at 544. And "[d]eductible contributions are similar to cash

grants of the amount of a portion of the individual's contributions." *Id.* Like a tax exemption and a tax deduction, a tax credit has much the same effect as a cash grant to an individual in the amount of the credit. As Judge O'Scannlain observed, the distinction between a tax credit and a tax deduction that the court tried to draw has no constitutional significance:

> Both [credits and deductions] result in a reduction of the money paid by the taxpayer to the government, with the amount of the reduction going to the designated STO. The only practical difference is that with a deduction the taxpayer must make a copayment of his own, whereas with a credit there is no copayment. Of course, this favors richer taxpayers over poorer ones, as the former are more able to afford a personal contribution. Moreover, in a progressive tax system, deductions most favor the taxpayers with the greatest income. Not only does the value of the deduction increase with the taxpayer's marginal rate, but so does the amount of government revenue that is diverted at the taxpayer's behest. It is difficult to see why such a regressive scheme (deductions) is constitutionally superior to the egalitarian tax credit.

Garriott Pet. App. 89a n.3. The Arizona Supreme Court also found no constitutional distinction between tax credits and tax deductions: "Though amounts may vary, both credits and deductions ultimately reduce state revenues, are intended to serve policy goals, and clearly act to induce 'socially beneficial behavior' by

taxpayers." *Kotterman*, 972 P.2d at 612 (quoting Elizabeth A. Baergen, Note, *Tuition Tax Deductions and Credits in Light of Mueller v. Allen*, 31 Wayne L. Rev. 157, 173 (1984)). Because there is no legal or logical basis for distinguishing between tax credits and other tax benefits for purposes of the Establishment Clause, the lower court erred in finding the distinction significant.

The court also erred in holding that the secular purpose for Section 1089 differs from the secular purposes for other tax benefit programs. In allowing a deduction for contributions to a § 501(c)(3) organization, Congress chose to subsidize activities "that non profit organizations undertake to promote the public welfare." *Regan*, 461 U.S. at 544; *see also Walz*, 397 U.S. at 673 (upholding New York's tax exemption that included houses of religious worship within a broad class of other nonprofit and quasi-public corporations because such organizations were beneficial and stabilizing influences in community life and the classification was in the public interest). Section 1089 encourages contributions to STOs that promote the public welfare by providing financial assistance to parents who wish to send their children to private schools. This valid secular purpose is not substantially different from the secular interests that other tax programs that this Court have upheld have advanced.

Relying on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the court also found that the public would perceive Section 1089 as government endorsement of

religion because the State delegated its authority to taxpayers by allowing their choices to affect parents' opportunities to select secular educational options for their children. Garriott Pet. App. 43a-44a. *Larkin* does not support the court's finding, and the court's assumption that parents would perceive that the State endorsed religious schools by allowing taxpayer contributions to fund STOs is illogical.

In *Larkin*, the Court invalidated a Massachusetts statute that gave *churches* the authority to veto a business's application for a liquor license if the business was located within a five-hundred-foot radius of the church because the statute permitted the church and the State to jointly exercise legislative authority. 459 U.S. at 126. The public may perceive that the State is favoring religion when it allows churches to veto an application for a liquor license because the government has thereby provided churches with a right that is has not provided to other institutions and the right it has provided – denying a permit – is a right traditionally reserved to the government. In contrast, the public would not perceive that Arizona was endorsing religion when it allowed taxpayers a credit for contributing money to any STO, including STOs that provide scholarships only to students attending religious schools, because this country has a long history of providing tax benefits to religious institutions. *See Zelman*, 536 U.S. at 665 (O'Connor, J., concurring) (noting that the amount that Cleveland provided to religious schools in vouchers paled in comparison "to the amount of funds that

federal, state, and local governments already provide religious institutions" through well-established tax policies).

The court also relied on *Larkin* to find that parents will perceive government endorsement because delegating the choice to taxpayers instead of to parents does not promote the program's secular purpose when there is no guarantee that taxpayers will refrain from using the program for sectarian purposes. Garriott Pet. App. at 44a-45a. Again, *Larkin* is inapt because the statute that the Court invalidated in *Larkin* granted churches zoning authority – not a tax benefit. Because the Court has held that there is no perceived endorsement of religion when the government provides tax exemptions to houses of worship, *Walz*, 397 U.S. at 693, there can be no perceived endorsement when the State provides a tax credit to taxpayers who contribute to religious STOs.

Moreover, the court's assumption that taxpayers' motivation for contributing to an STO is more likely to be religious than parents' motivation for choosing a private school for their child is pure conjecture. As Judge O'Scannlain noted, parents are often motivated by their religious beliefs when they choose to send their child to a private religious school. Garriott Pet. App. 109a. And it is likely that taxpayers are often motivated by the secular interest of helping children to receive a quality education when they provide financial assistance to STOs that give scholarships to private schools that they believe in. Regardless of the validity of the court's assumption that there is a

"misalignment between parents' interests and taxpayers' desires" Garriott Pet. App. 44a, its reliance on private motivation to establish government endorsement is foreclosed by this Court's private-choice precedent.

The Court should reverse the court of appeals' decision because it is directly contrary to established precedent. Section 1089 is a neutral program of true private choice, and an objective observer therefore would not perceive it as the State's endorsement of religion. The district court therefore correctly dismissed Respondents' complaint.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' decision.

Respectfully submitted,

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2010 Ariz. Sess. Laws ch. 188 (S.B. 1274, approved April 27, 2010, eff. July 27, 2010, to be codified at A.R.S. § 43-1089):[1]

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions by the taxpayer or on the taxpayer's behalf pursuant to section 43-401, subsection ~~H~~ I during the taxable year to a school tuition organization, but not exceeding:

1. Five hundred dollars in any taxable year for a single individual or a head of household.

2. Eight hundred twenty-five dollars in taxable year 2005 for a married couple filing a joint return.

3. One thousand dollars in taxable year 2006 and any subsequent taxable year for a married couple filing a joint return.

B. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

C. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not

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[1] In each version of A.R.S. § 43-1089, the text that was deleted by the amendment is lined through and text that was added by the amendment is underlined.

used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

D. The credit allowed by this section is in lieu of any deduction pursuant to section 170 of the internal revenue code and taken for state tax purposes.

E. The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer.

F. A school tuition organization that receives a voluntary cash contribution pursuant to subsection A shall report electronically to the department, in a form prescribed by the department, by February 28 of each year the following information:

1. The name, address and contact name of the school tuition organization.

2. The total number of contributions received during the previous calendar year.

3. The total dollar amount of contributions received during the previous calendar year.

4. The total number of children awarded educational scholarships or tuition grants during the previous calendar year.

5. The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.

6. For each school to which educational scholarships or tuition grants were awarded:

(a) The name and address of the school.

(b) The number of educational scholarships and tuition grants awarded during the previous calendar year.

(c) The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.

G. For the purposes of this section, a contribution, for which a credit is claimed, that is made on or before the fifteenth day of the fourth month following the close of the taxable year may be applied to either the current or preceding taxable year and is considered to have been made on the last day of that taxable year.

G–H. For the purposes of this section:

1. "Handicapped student" means a student who has any of the following conditions:

(a) Hearing impairment.

(b) Visual impairment.

(c) Developmental delay.

(d) Preschool severe delay.

(e) Speech/language impairment.

2. "Qualified school" means a nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state,

that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

3. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under section 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.

2010 Ariz. Sess. Laws ch. 293, § 1 (H.B. 2664, approved May 10, 2010, eff. Dec. 31, 2010, to be codified at A.R.S. § 43-1089):

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions by the taxpayer or on the taxpayer's behalf pursuant to section 43-401, subsection ~~H~~ I during the taxable year to a school tuition organization, ~~but not exceeding~~ that is certified pursuant to chapter 15 of this title at the time of donation. Except as provided by subsection C of this section, the amount of the credit shall not exceed:

1. Five hundred dollars in any taxable year for a single individual or a head of household.

~~2. Eight hundred twenty-five dollars in taxable year 2005 for a married couple filing a joint return.~~

~~3.~~ 2. One thousand dollars in ~~taxable year 2006 and~~ any ~~subsequent~~ taxable year for a married couple filing a joint return.

B. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

C. For each taxable year beginning on or after January 1, the department shall adjust the dollar amounts prescribed by subsection A, paragraphs 1 and 2 of this section according to the average annual change in the metropolitan Phoenix consumer price index published by the United States bureau of labor statistics, except that the dollar amounts shall not be revised downward below the amounts allowed in the prior taxable year. The revised dollar amounts shall be raised to the nearest whole dollar.

~~C.~~ D. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

~~D.~~ E. The credit allowed by this section is in lieu of any deduction pursuant to section 170 of the internal revenue code and taken for state tax purposes.

~~E.~~ F. The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer or if the taxpayer DESIGNATES a student beneficiary as a condition of the taxpayer's contribution to the school tuition organization. The tax credit is not allowed if the taxpayer, with the intent to benefit the taxpayer's dependent, agrees with one or more other taxpayers to designate each taxpayer's contribution to the school tuition organization for the direct benefit of the other taxpayer's dependent.

~~F. A school tuition organization that receives a voluntary cash contribution pursuant to subsection A shall report electronically to the department, in a form prescribed by the department, by February 28 of each year the following information:~~

~~1. The name, address and contact name of the school tuition organization.~~

~~2. The total number of contributions received during the previous calendar year.~~

~~3. The total dollar amount of contributions received during the previous calendar year.~~

~~4. The total number of children awarded educational scholarships or tuition grants during the previous calendar year.~~

~~5. The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.~~

~~6. For each school to which educational scholarships or tuition grants were awarded:~~

~~(a) The name and address of the school.~~

~~(b) The number of educational scholarships and tuition grants awarded during the previous calendar year.~~

~~(c) The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.~~

G. For the purposes of this section:

1. "Handicapped student" means a student who has any of the following conditions:

(a) Hearing impairment.

(b) Visual impairment.

(c) Developmental delay.

(d) Preschool severe delay.

(e) Speech/language impairment.

2. "Qualified school":

(a) Means a nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of

race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

(b) Does not include a charter school or programs operated by charter schools.

~~3. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under section 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.~~

2010 Ariz. Sess. Laws ch. 293, § 2 (H.B. 2664, approved May 10, 2010, eff. Dec. 31, 2010, to be codified at A.R.S. §§ 43-1501 – 1505):[2]

CHAPTER 15
SCHOOL TUITION ORGANIZATIONS FOR INDIVIDUAL CONTRIBUTIONS
ARTICLE 1. GENERAL PROVISIONS

43-1501. Definitions

In this chapter, unless the context otherwise requires:

1. "Allocate" includes reserving money for an award of a multiyear educational scholarship or tuition grant for a specific student.

2. "Fiscal year" means the fiscal year of the state as prescribed in section 35-102.

3. "Qualified school" has the same meaning prescribed in section 43-1089.

A.R.S. § 43-1502. Certification as a school tuition organization

A. A nonprofit organization in this state that is exempt or has applied for exemption from federal taxation under section 501(c)(3) of the internal revenue code may apply to the department of revenue for certification as a school tuition organization, and the department shall certify the school tuition

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[2] The text of these provisions are not underlined but they are new statutory provisions.

organization if it meets the requirements prescribed by this chapter. An organization must apply for certification on a form prescribed and furnished on request by the department

B. The department shall:

1. Maintain a public registry of currently certified school tuition organizations.

2. Make the registry available to the public on request.

3. Post the registry on the department's official website.

C. The department shall send written notice by certified mail to a school tuition organization if the department determines that the school tuition organization has engaged in any of the following activities:

1. Failing or refusing to allocate at least ninety per cent of annual revenues for educational scholarships or tuition grants.

2. Failing or refusing to file the annual reports required by section 43-1504.

3. Limiting availability of scholarships to students of only one school.

4. Encouraging, facilitating or knowingly permitting taxpayers to engage in actions prohibited by this article.

5. Awarding, restricting or reserving educational scholarships or tuition grants for use by a particular student based solely on the recommendation of the donor.

D. A school tuition organization that receives notice from the department pursuant to subsection C of this section has ninety days to correct the violation identified by the department in the notice. If a school tuition organization fails or refuses to comply after ninety days, the department may remove the organization from the list of certified school tuition organizations and shall make available to the public notice of removal as soon as possible. An organization that is removed from the list of certified school tuition organizations must notify any taxpayer who attempts to make a contribution that the contribution is not eligible for the tax credit and offer to refund all donations received after the date of the notice of termination of certification.

E. A school tuition organization may request an administrative hearing on the revocation of its certification as provided by title 41, chapter 6, article 10. Except as provided in section 41-1092.08, subsection H, a decision of the department is subject to judicial review pursuant to title 12, chapter 7, article 6.

A.R.S. § 43-1503. Operational requirements for school tuition organizations; notice; qualified schools

A. A certified school tuition organization must be established to receive contributions from taxpayers

for the purposes of income tax credits under section 43-1089 and to pay educational scholarships or tuition grants to allow students to attend any qualified school of their parents' choice.

B. To be eligible for certification and retain certification, the school tuition organization:

1. Must allocate at least ninety per cent of its annual revenue for educational scholarships or tuition grants.

2. Shall not limit the availability of educational scholarships or tuition grants to only students of one school.

3. May allow donors to recommend student beneficiaries, but shall not award, designate or reserve scholarships solely on the basis of donor recommendations.

4. Shall not allow donors to designate student beneficiaries as a condition of any contribution to the organization, or facilitate, encourage or knowingly permit the exchange of beneficiary student designations in violation of section 43-1089, subsection F.

C. A school tuition organization shall include the following notice in any printed materials soliciting donations, in applications for scholarships and on its website:

NOTICE

A school tuition organization cannot award, restrict or reserve scholarships solely on the basis of a donor's recommendation.

A taxpayer may not claim a tax credit if the taxpayer agrees to swap donations with another taxpayer to benefit either taxpayer's own dependent.

D. In evaluating applications and awarding, designating or reserving scholarships, a school tuition organization:

1. Shall not award, designate or reserve a scholarship solely on the recommendation of any person contributing money to the organization, but may consider the recommendation among other factors.

2. Shall consider the financial need of applicants.

E. A qualified school shall not accept an educational scholarship or tuition grant from a school tuition organization in an amount that exceeds the school's total cost of educating the student in whose name the scholarship or grant is received.

43-1504. Annual report

On or before September 30 of each year, Each school tuition organization shall report electronically to the department, in a form prescribed by the department, the following information, separately compiled and identified for the purposes of section 43-1089:

1. The name, address and contact person of the school tuition organization.

2. The total number of contributions received during the previous fiscal year.

3. The total dollar amount of contributions received during the previous fiscal year.

4. The total number of children awarded educational scholarships or tuition grants during the previous fiscal year.

5. The total dollar amount of:

(a) Educational scholarships and tuition grants distributed during the previous fiscal year.

(b) Money being held for identified students' scholarships and tuition grants in future years.

6. The cost of audits pursuant to section 43-1505 paid during the fiscal year.

7. The total dollar amount of educational scholarships and tuition grants awarded during the previous fiscal year to:

(a) Students whose family income meets the economic eligibility requirements established under the national school lunch and child nutrition acts (42 United States Code sections 1751 through 1785) for free or reduced price lunches.

(b) Students whose family income exceeds the threshold prescribed by subdivision (a) of this paragraph but does not exceed one hundred eighty-five per cent of the economic eligibility requirements established under the national school lunch and child nutrition acts (42 United States Code sections 1751 through 1785) for free or reduced price lunches.

8. For each school to which educational scholarships or tuition grants were awarded:

(a) The name and address of the school.

(b) The number of educational scholarships and tuition grants awarded during the previous fiscal year.

(c) The total dollar amount of educational scholarships and tuition grants awarded during the previous fiscal year.

9. The names, job titles and annual salaries of the three employees who receive the highest annual salaries from the school tuition organization.

43-1505. Audits and financial reviews

A. On or before September 30 of each year, each school tuition organization that received one million dollars or more in total donations in the previous fiscal year shall provide for a financial audit of the organization. The audit must be conducted in accordance with generally accepted auditing standards and must evaluate the organization's compliance with

the fiscal requirements of this article. The audit must be conducted by an independent certified public accountant licensed in this state. The certified public accountant and the firm the certified public accountant is affiliated with shall be independent with respect to the organization, its officers and directors, services performed and all other independent relationships prescribed by generally accepted auditing standards.

B. On or before September 30 of each year, each school tuition organization that received less than one million dollars in total donations in the previous fiscal year shall provide for a financial review of the organization. The review must be conducted in accordance with standards for accounting and review services and must evaluate the organization's compliance with the fiscal requirements of this article. The review must be conducted by an independent certified public accountant licensed in this state. The certified public accountant and the firm the certified public accountant is affiliated with shall be independent with respect to the organization, its officers and directors, services performed and all other independent relationships prescribed by generally accepted auditing standards.

C. Within five days after receiving the audit or financial review the school tuition organization shall file a signed copy of the audit or financial review with the department.

D. The school tuition organization shall pay the fees and costs of the certified public accountant under this section from the organization's operating monies. The fees and costs shall be excluded from the calculation of total revenues spent on scholarships and tuition grants.

STATE OF ARIZONA [SEAL]
Department of Revenue
Office of the Director
(602) 716-6090

Jan Brewer
Governor

Gale Garriott
Director

INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2009 EXECUTIVE SUMMARY

- $50,853,086 in donations to private school tuition organizations were reported to the Arizona Department of Revenue for 2009. This is a decrease of 8.0% over the $55,261,284 reported for 2008.
- 73,391 donations to private school tuition organizations were reported, a decrease of 6.4% over 2008.
- The Department was aware of 53 school tuition organizations operating in Arizona in 2009, a decrease from the 55 STOs that participated in 2008.
- The average donation in 2009 was $693. This is a decrease from the $705 average in 2008.
- Scholarships paid by school tuition organizations in 2009 totaled $52.1 million, a 3.7% decrease over the amount of scholarships paid in 2008.

- The number of scholarships paid in 2009 was 27,582, a 2.6% decrease from the 28,327 scholarships paid in 2008.
- 370 private schools in Arizona received scholarship money from school tuition organizations, 3 less than last year.
- Two school tuition organizations gave scholarships to only one private school.
- Four school tuition organizations gave scholarships to 100 or more private schools.
- The smallest average scholarship paid by a school tuition organization to a school was $40, paid by the Arizona Scholarship Fund to Bethany Christian School in Lake Havasu City.
- The largest average scholarship paid by a school tuition organization to a school was $21,500, paid by Arizona Scholarship Fund to the Ethos School.
- The majority of the scholarships (63%) and the scholarship money (66%) was paid to schools in Maricopa County.

INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2009

Arizona's individual income tax credit for contributions to school tuition organizations, referred to as the private school tax credit, is governed by A.R.S. §43-1089. School tuition organizations (STOs) must

report the following information to the Arizona Department of Revenue by February 28:

1. The name, address and contact name of the STO.

2. The number of contributions received in the previous calendar year.

3. The dollar amount of contributions received in the previous calendar year.

4. The number of children[1] awarded scholarships or grants during the previous calendar year.

5. The dollar amount of scholarships and grants awarded during the previous calendar year.

6. The name and address of each qualified school[2] receiving the scholarships or grant money, along with the number and dollar amount of scholarships or grants provided to each school.

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[1] The Department of Revenue has determined that "children" as identified in this statute would generally be 18 years or younger.

[2] Qualified school is defined in statute as a "nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin . . ." The Department of Revenue has further clarified this by saying that these primary and secondary schools must educate children in a course of study that leads to promotion to the next class or to graduation.

The Arizona Department of Revenue was aware of 53 STOs operating in Arizona in 2009, two less than in 2008. (Three organizations stopped operating: Carden Schools Scholarship Fund, Classical Christian Scholarship Fund and Educare Scholarship Fund.) The number and amount of donations are set out in the following table. For calendar year 2009, $50.9 million has been reported by 53 STOs, an 8.0% decrease over the donations reported for 2008.

Arizona Christian School Tuition Organization is the largest school tuition organization in terms of number and amount of donations received. Arizona Christian School Tuition Organization reported $10.4 million in donations, 20.4% of the total. The Catholic Tuition Organization of the Diocese of Phoenix reported $9.2 million in donations, 18.0% of the total reported. These two organizations received more than 38% of the total donations. Of the 52 STOs reporting in 2008 and 2009, 38 saw a decline in donations from 2008. To review the donations reported by each STO, see Appendix I at the end of this report.

Calendar Year	# of STOs	# of Donations	Amount	% change in amount
2009	53	73,391	$50,853,086	(8.0%)
2008	55	78,407	$55,261,284	1.8%
2007	55	76,065	$54,303,282	6.5%
2006[3]	56	73,617	$51,011,815	20.9%

[3] The maximum donation for married filing joint returns increased to $1,000 from $825.

2005[4]	53	69,239	$42,194,898	32.5%
2004	53	63,830	$31,846,070	8.2%
2003	51	58,122	$29,445,494	11.2%
2002	43	52,161	$26,482,993	6.3%
2001[5]	43	46,755	$24,924,656	40.8%
2000	36	38,249	$17,701,284	28.4%
1999	33	32,023	$13,781,341	
1998[6]	16	4,248	$1,815,798	

STOs reported 27,582 scholarships paid for $52.1 million in 2009, an average of $1,889 per scholarship[7]. This is a 2.6% decrease in the number of scholarships reported over calendar year 2008 and a 3.7% decrease in the total scholarship paid. The following table shows the history of scholarships and grants paid out by STOs, based on information reported to the Department of Revenue. The range of average scholarship amounts paid by the individual STOs is from $180 (Montessori Centre School Tuition Organization) to $20,850 (Life Development Institute Scholarship Fund). To review the scholarships paid by each STO, see Appendix II at the end of this report.

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[4] The maximum donation for married filing joint returns increased to $825 from $625.

[5] The maximum donation for married filing joint returns increased to $625 from $500.

[6] Activity in 1998 was artificially low due to a court case challenging the constitutionality of the credit based on separation of church and state. The credit was determined to be constitutional.

[7] This does not mean that 27,582 students received scholarships. One student may have received scholarships from more than one STO.

Calendar Year	# of STOs Reporting	# of Scholarships	Amount	% chg in amount	Average scholarship	% chg in avg
2009	52	27,582	$52,091,718	(3.7)	$1,889	(1.0)
2008	55	28,321	$54,089,934	11.3	$1,909	6.8
2007	55	27,153	$48,561,687	19.7	$1,788	8.8
2006	56	24,678	$40,557,643	31.4	$1,643	19.9
2005	54	22,529	$30,863,153	9.4	$1,370	2.7
2004	51	21,146	$28,201,770	15.4	$1,334	9.9
2003	49	20,134	$24,437,877	7.1	$1,214	4.1
2002	36	19,582	$22,826,746	38.5	$1,166	27.7
2001	32	18,049	$16,484,958	21.6	$913	1.6
2000	30	15,081	$13,561,981	517.4	$899	37.7
1999	17	3,365	$2,196,734	2016.5	$653	(19.5)
1998[3]	4	128	$103,790		$811	

[3] Activity in 1998 was artificially low due to a court case. See Footnote 6.

Average scholarship ranges and the number of STOs with scholarships falling in each range is shown in the following frequency distribution.

Avg. Scholarship Range	# of STOs	Avg. Scholarship Range	# of STOs
$101 – $1,000	6	$3,001 – $4,000	5
$1,001 – $1,500	8	$4,001 – $5,000	3
$1,501 – $2,000	16	$5,001 – $7,500	5
$2,001 – $2,500	3	$7,501 – $10,000	0
$2,501 – $3,000	5	$10,000 and over	1

Of the 52 STOs that actually paid scholarships in 2009 (one newly formed STO, Just Friends of Education, paid no scholarships), 23 increased their average scholarship amount from the prior year. One STO paid scholarships for the first time, so its average scholarship amount neither increased nor decreased.

STOs provided scholarships and grants to 370 private schools throughout Arizona. There were 32 private schools that received scholarship money in 2008 year that did not receive any scholarship money in 2009.

Arizona Scholarship Fund provided scholarships and grants to 171 schools, more schools than any other STO. Appendix III, at the end of this report, lists the number of schools to which each STO provided scholarships and how many more or less schools received scholarships from the STO in the prior year. For example, Arizona Adventist Scholarships provided scholarships to 15 schools in 2009, which is one

less than last year. That information is aggregated in the following table.

# of private schools	# of organizations giving to this number of private schools
1	2
2	12
3	10
4	2
5	2
6-10	8
11-20	8
25-99	4
100 or more	4

As shown above, two STOs gave scholarships to only one private school. Those two STOs are Dynamite Montessori Foundation and Life Development Institute Education Fund. Not mentioned in the table above is one STO that did not pay any scholarships in 2009. Just Friends of Education is a new STO that will be making its first scholarship awards in 2010.

Two private schools, Christ Lutheran School and Northwest Christian School, received scholarship/grant money from eleven different STOs. Two private schools, Desert Christian Unified Schools and Valley Lutheran High School, received scholarship/grant money from ten different STOs. The following table shows the number of STOs contributing scholarship/grant money to the private schools.

This many private schools received scholarships or grants from	This many STOs
155	One STO
75	Two STOS
54	Three STOS
34	Four STOs
20	Five STOS
15	Six STOS
5	Seven STOs
6	Eight STOs
2	Nine STOs
2	Ten STOs
2	Eleven STOs

In other words, 155 private schools received scholarship/grant money from only one STO. There were 75 private schools that received scholarship/grant money from two STOs.

The *smallest* average scholarship paid by an STO to one private school was $40 paid by the Arizona Scholarship Fund to Bethany Christian School in Lake Havasu City. Seven private schools received average scholarships from STOs for more than $10,000. The *highest* average scholarship paid by an STO to one private school was $21,500 paid by Arizona Scholarship Fund to Ethos School.

Eight private schools received more than $1 million total from all STOs. The most scholarship/grant money received by one private school from all STOs was $1,585,390 for 1,006 scholarships ($1,576 average) to Northwest Christian School in Phoenix.

Appendix IV lists the 370 private schools that received scholarship/grant money, the number of scholarships, the amount and the average scholarship. This table also shows the percent change in amount of scholarship money received and the percent change in the average scholarship paid if the school also received scholarship money in 2008.

Highlighted schools received more scholarship money in total than in 2008 and had a higher average scholarship than in 2008. (The total number of scholarships shown on Appendix IV totals 27,658, 76 more than the number of scholarships shown on the table on page 3. Two STOs reported that 76 students received scholarships to two schools, meaning they switched schools at some point in the calendar year.)

The following table presents the distribution of average scholarships. For example, the average scholarship received by six private schools was between $1 and $250. The average scholarship received by 17 private schools was between $251 and $500.

Avg. Scholarship Range	# of Private Schools with Avg. Scholarships in this Range[9]	Avg. Scholarship Range	# of Private Schools with Avg. Scholarships in this Range
$1 – $250	6	$2,501 – $3,000	27
$251 – $500	17	$3,001 – $4,000	19
$501 – $1,000	50	$4,001 – $5,000	10
$1,001 – $1,500	84	$5,001 – $7,500	12
$1,501 – $2,000	89	$7,501 – $10,000	2
$2,001 – $2,500	49	> $10,001	5

Of the 370 private schools, 84 (22.7%) had increases in both total scholarship money and average scholarship money. In 2008, 153 (41.0%) private schools had increases in both total scholarship money and average scholarship money.

In terms of where the scholarship/grant money went within Arizona, the most money went to schools within the city of Phoenix. About 32% of the scholarships went to 76 private schools in Phoenix and almost 35% of the money. As would be expected, 63% of all scholarships granted went to schools in Maricopa County and 66% of the money, the same percentages as in 2008. The following table shows the number of scholarships the amount of scholarships and the average scholarship paid out by county.

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[9] The average scholarship tallied here is total scholarship on average from all STOs.

County	# of Scholarships	Scholarship $	Avg. Scholarship
Apache	340	$408,395	$1,201
Cochise	336	$573,714	$1,707
Coconino	162	$436,966	$2,697
Gila	315	$564,199	$1,791
Graham	23	$24,833	$1,080
Greenlee	0	$0	$0
La Paz	14	$23,978	$1,713
Maricopa	17,329	$34,181,597	$1,973
Mohave	223	$303,536	$1,361
County	**# of Scholarships**	**Scholarship $**	**Avg. Scholarship**
Navajo	399	$694,271	$1,740
Pima	6,412	$11,553,491	$1,802
Pinal	359	$531,814	$1,481
Santa Cruz	204	$170,094	$834
Yavapai	729	$1,520,460	$2,086
Yuma	812	$1,104,386	$1,360

Appendix V shows the cities within which the scholarship/grant money was received, the average scholarship and the percent change from 2008. It also shows the rank for 2009 and for 2008, which indicates the city or town with the highest average scholarship (Carefree #1 with an average scholarship of $4,420) to the lowest average scholarship (Chinle #65 with an average scholarship of $143)

APPENDIX I

2009 DONATIONS RECEIVED BY SCHOOL TUITION ORGANIZATION

SCHOOL TUITION ORGANIZATION	# of 2009 donations	2009 donations	% chg in #[N]	% chg in $
Alternative Schools Scholarship Fund	23	$13,350	(20.7)	(21.2)
Arizona Adventist Scholarships	631	$422,831	(5.1)	(4.6)
Arizona Christian School Tuition Organization	13,977	$10,398,811	(10.0)	(10.0)
Arizona Episcopal Schools Foundation	1,116	$693,618	(5.7)	(27.1)
Arizona Independent Schools Scholarship Foundation	1,091	$778,033	(6.6)	(7.5)
Arizona International Academy Scholarship Fund	78	$44,900	(9.3)	(30.7)
Arizona Lutheran Scholarship Organization	223	$162,675	(17.1)	(16.6)
Arizona Native Scholastic & Enrichment Resources	64	$38,510	12.3	(1.9)
Arizona Private Education Scholarship Fund	1,854	$1,466,020	14.7	15.2
Arizona Scholarship Fund	6,872	$5,159,220	(16.9)	(16.3)
Arizona School Choice Trust	1,354	$1,022,823	(19.5)	(32.2)
Arizona Tuition Organization	1,702	$1,237,877	(8.3)	(8.4)
Arizona Waldorf Scholarship Fund	236	$141,014	11.9	15.0
BEST Student Fund	318	$240,091	20.0	15.3
Brophy Community Foundation	1,394	$969,744	(10.3)	(11.6)
Catholic Tuition Organization of the Diocese of Phoenix	13,712	$9,170,855	(2.9)	(6.3)
Catholic Tuition Organization for the Diocese of Tucson	7,922	$4,124,864	(7.1)	(5.6)
Chabad Tuition Organization	242	$144,369	2.1	1.3
Chaparral Mission Scholarship Fund	215	$147,107	(22.1)	(16.5)
Chesler Scholarship Organization	723	$522,312	(17.6)	(33.3)
Children's Scholarship Network of Arizona	92	$117,151	10.8	148.9
Christ Lutheran School Foundation	256	$164,871	(15.2)	(20.5)
Christian Scholarship Foundation[a]	329	$206,027	(14.8)	(13.0)
Christian Scholarship Fund of Arizona	506	$300,387	(12.3)	(23.4)
Cochise Christian School Tuition Organization	624	$351,389	8.3	2.2
Dynamite Montessori Foundation	56	$40,589	14.3	21.8
Flagstaff Scholarship Fund	324	$201,740	(14.3)	(14.2)
Foundation for Lutherans Interested in Funding Education	73	$50,379	(8.7)	(5.9)
Foundation for Montessori Scholarships	80	$52,350	(8.1)	(7.4)
Higher Education for Lutheran Program	1,421	$936,844	(12.3)	(18.2)
Institute for Better Education	6,446	$4,803,063	2.3	4.1
Jewish Tuition Organization[b]	2,340	$1,591,486	(8.2)	(10.1)
Just Friends of Education	4	$2,600	n/a	n/a
Life Development Institute Education Foundation	11	$8,600	(56.0)	(50.3)
Lutheran Education Foundation	198	$120,261	(18.5)	(19.7)
Maricopa County Schoolhouse Foundation	140	$84,306	(44.7)	(45.9)
Montessori Centre School Tuition Organization	1	$200	(99.0)	(99.7)
Montessori Scholarship Organization	508	$403,916	23.6	22.9

[N] NA indicates that the STO was not operational in the prior year

[a] Formerly Prescott Christian School Scholarship Foundation

[b] Formerly Jewish Community Day School Scholarship Fund

New Valley Education Partners	484	$347,661	63.0	30.3
Northern Arizona Christian School Scholarship Fund	466	$358,314	(3.3)	19.2
Orme Primavera Schools Foundation	270	$196,607	(11.5)	(8.6)
Pinetop Tuition Support Organization	13	$11,950	(35.0)	(35.7)
School Choice Arizona	193	$128,142	(31.8)	(29.0)
School Tuition Association of Yuma	372	$287,403	(19.8)	(14.6)
Schools With Heart Foundation	424	$288,385	(0.7)	(1.3)
Shepherd of the Desert Foundation	218	$129,915	17.8	(6.5)
Southern Arizona Foundation for Education	471	$298,803	(1.3)	(12.7)
Tempe Montessori's Parents Organization	187	$137,219	(28.9)	(23.7)
Tuition Organization for Private Schools	1,990	$1,474,937	15.5	16.1
Valley Lutheran Scholarship Organization	149	$93,485	(8.0)	(4.9)
VVBC Christian Education Fund	36	$23,270	(2.7)	(19.2)
White Mountain Tuition Support Foundation	220	$135,053	11.1	2.1
Yuma's Education Scholarship Fund for Kids	742	$606,758	21.0	24.5
TOTAL	**73,391**	**$50,853,086**	**(6.4)**	**(8.0)**

Arizona Department of Revenue, Office of Economic Research & Analysis, 4/21/10

APPENDIX II

2009 SCHOLARSHIPS PAID BY SCHOOL TUITION ORGANIZATION

SCHOOL TUITION ORGANIZATION	# of 2009 scholarships	2009 scholarships	% chg in #	% chg in $	Average scholarship	% chg in average
Alternative Schools Scholarship Fund	22	$12,015	(12.0)	(18.3)	$546.14	(7.1)
Arizona Adventist Scholarships	436	$450,872	(45.0)	0.9	$1,034.11	83.5
Arizona Christian School Tuition Organization	5,523	$10,807,320	(1.1)	(1.4)	$1,956.78	(0.3)
Arizona Episcopal Schools Foundation	142	$741,216	(35.2)	(26.0)	$5,219.83	14.1
Arizona Independent Schools Scholarship Foundation	114	$816,769	2.7	1.6	$7,164.64	(1.1)
Arizona International Academy Scholarship Fund	34	$49,100	13.3	(16.3)	$1,444.12	(26.2)
Arizona Lutheran Scholarship Organization	54	$151,930	22.7	132.1	$2,813.52	14.5
Arizona Native Scholastic & Enrichment Resources	11	$30,180	120.0	250.9	$2,743.64	59.5
Arizona Private Education Scholarship	677	$1,156,639	41.0	48.4	$1,708.46	5.2
Arizona Scholarship Fund	3,116	$5,501,088	10.3	2.5	$1,765.43	(7.1)
Arizona School Choice Trust	739	$1,618,223	(38.5)	(36.0)	$2,189.75	4.1
Arizona Tuition Organization	729	$1,258,016	0.4	1.9	$1,725.67	1.5
Arizona Waldorf Scholarship Fund	54	$122,214	(14.3)	13.8	$2,263.22	32.8
BEST Student Fund	124	$202,618	29.2	(5.0)	$1,634.02	(26.5)
Brophy Community Foundation	349	$966,475	(11.7)	(26.7)	$2,769.27	(17.1)
Catholic Tuition Organization of the Diocese of Phoenix	5,040	$9,377,207	(11.0)	(9.7)	$1,860.56	1.5
Catholic Tuition Support Organization for the Diocese of Tucson	2,588	$4,330,366	(9.3)	(3.1)	$1,673.25	6.9
Chabad Tuition Organization	23	$129,938	(8.0)	29.9	$5,649.48	41.2

Chaparral Mission Scholarship Fund	107	$165,677	(9.3)	(16.3)	$1,548.38	(7.7)
Cheder Scholarship Organization	93	$532,812	(6.1)	(20.9)	$5,729.16	(15.8)
Children's Scholarship Network of Arizona	80	$116,128	n/a	n/a	$1,451.60	n/a
Christ Lutheran School Foundation	62	$164,203	(8.8)	(3.2)	$2,648.44	6.2
Christian Scholarship Foundation	141	$235,032	16.5	7.1	$1,666.89	(8.1)
Christian Scholarship Fund of Arizona	321	$344,097	9.2	(27.2)	$1,071.95	(33.3)
Cochise Christian School Tuition Organization	215	$384,342	2.4	0.9	$1,787.64	(1.5)
Dynamite Montessori Foundation	33	$24,556	(28.3)	(6.6)	$744.12	30.2
Flagstaff Scholarship Fund	72	$221,325	(13.3)	23.4	$3,073.96	42.3
Foundation for Lutherans Interested in Funding Education	58	$59,181	5.5	(12.0)	$1,020.36	(16.6)
Foundation for Montessori Scholarships	74	$65,380	85.0	13.1	$883.51	(38.9)
Higher Education for Lutheran Program	798	$1,111,237	(2.7)	(5.1)	$1,392.53	(2.4)
Institute for Better Education	2,626	$4,207,154	14.7	11.2	$1,602.12	(3.0)
Jewish Tuition Organization	435	$1,705,941	11.8	(21.5)	$3,921.70	(29.8)
Just Friends of Education	0	$0	n/a	n/a	$0	n/a
Life Development Institute Education Foundation	2	$41,700	0.0	81.3	$20,850.00	81.3
Lutheran Education Foundation	82	$155,050	(5.8)	(25.9)	$1,890.85	(21.4)
Maricopa County Schoolhouse Foundation	84	$287,807	33.3	97.7	$3,426.27	65.7
Montessori Centre School Tuition Organization	1	$180	(98.7)	(99.8)	$180.00	(81.8)
Montessori Scholarship Organization	197	$336,612	40.7	15.0	$1,708.69	(18.3)

New Valley Education Partners	89	$372,254	206.9	54.8	$4,182.63	(49.5)
Northern Arizona Christian School Scholarship Fund	165	$284,742	10.0	9.1	$1,725.71	(0.8)
Orme Primavera Schools Foundation	58	$201,089	13.7	(5.4)	$3,467.05	(16.8)
Pinetop Tuition Support Organization	13	$22,820	44.4	154.7	$1,755.38	76.3
School Choice Arizona	22	$156,153	175.0	136.9	$7,097.86	(13.8)
School Tuition Association of Yuma	278	$265,145	(4.5)	(17.7)	$953.76	(13.8)
Schools With Heart Foundation	65	$275,121	(15.6)	(9.1)	$4,232.63	7.7
Shepherd of the Desert Education Program	84	$183,609	9.1	81.1	$2,185.82	66.0
Southern Arizona Foundation for Education	172	$318,856	(12.7)	0.8	$1,853.81	15.5
Tempe Montessori's Parents Organization	52	$173,400	8.3	34.6	$3,334.62	24.2
Tuition Organization for Private Schools	829	$1,200,833	6.6	4.0	$1,448.53	(2.4)
Valley Lutheran Scholarship Organization	96	$93,000	45.5	(23.1)	$968.75	(47.2)
VVBC Christian Education Fund	8	$33,329	(33.3)	6.0	$4,166.13	59.0
White Mountain Tuition Support Foundation	44	$116,250	12.8	19.2	$2,642.05	5.7
Yuma's Education Scholarship Fund for Kids	351	$514,526	33.0	18.1	$1,465.89	(11.2)
Total	**27,582**	**$52,091,718**	**(2.3)**	**(3.7)**	**$1,888.61**	**(1.1)**

APPENDIX III

NUMBER OF SCHOOLS TO WHICH SCHOLARSHIPS/GRANTS WERE PROVIDED BY SCHOOL TUITION ORGANIZATION

SCHOOL TUITION ORGANIZATION	# of schools to which scholarships/ grants were provided	# change from prior year
Alternative Schools Scholarship Fund	3	0
Arizona Adventist Scholarships	15	(1)
Arizona Christian School Tuition Organization	119	(3)
Arizona Episcopal Schools Foundation	6	1
Arizona Independent Schools Scholarship Foundation	3	0
Arizona International Academy Scholarship Fund	4	(1)
Arizona Lutheran Scholarship Organization	2	(3)
Arizona Native Enrichment and Scholastic Resources	3	(1)
Arizona Private Education Scholarship Fund	51	6
Arizona Scholarship Fund	**171**	**14**
Arizona School Choice Trust	120	(4)
Arizona Tuition Organization	8	0

Arizona Waldorf Scholarship Fund	2	0
BEST Student Fund	2	0
Brophy Community Foundation	18	(2)
Catholic Tuition Organization of the Diocese of Phoenix	39	1
Catholic Tuition Support Organization for the Diocese of Tucson	25	0
Chabad Tuition Organization	2	1
Chaparral Mission Scholarship Fund	3	0
Cheder Scholarship Organization	2	0
Children's Scholarship Network	2	n/a
Christ Lutheran School Foundation	3	0
Christian Scholarship Foundation[13]	2	0
Christian Scholarship Fund of Arizona	12	(3)
Cochise Christian School Tuition Organization	13	0
Dynamite Montessori Foundation	1	(3)
Flagstaff Scholarship Fund	4	1

[13] Formerly Prescott Christian School Scholarship Foundation

Foundation for Lutherans Interested in Funding Education	2	0
Foundation for Montessori Scholarships	5	1
Higher Education for Lutheran Program	14	0
Institute for Better Education	102	6
Jewish Tuition Organization	6	0
Life Development Institute Education Foundation	1	0
Lutheran Education Foundation	10	(2)
Maricopa County Schoolhouse Foundation	7	3
Montessori Centre School Tuition Organization	1	(3)
Montessori Scholarship Organization	13	0
New Valley Education Partners	3	1
Northern Arizona Christian School Scholarship Fund	5	1
Orme Primavera Schools Foundation	2	0
Pinetop Tuition Support Organization	2	0
School Choice Arizona	10	8
School Tuition Association of Yuma	9	0
Schools With Heart Foundation	3	0

Shepherd of the Desert Education Program	8	(4)
Southern Arizona Foundation for Education	3	(1)
Tempe Montessori's Parents Organization	3	(1)
Tuition Organization for Private Schools	72	1
Valley Lutheran Scholarship Organization	2	0
VVBC Christian Education Fund	3	(1)
White Mountain Tuition Support Foundation	2	(1)
Yuma's Education Scholarship Fund for Kids	13	0

APPENDIX IV

NUMBER AND AMOUNT OF SCHOLARSHIPS RECEIVED BY SCHOOL

School	# of Scholarships	Scholarship $	% chg from 2008	Avg. Scholarship	% chg from 2008
2nd Street Children's School	17	$35,296	71.7	$2,076	(9.1)
91st Psalms Christian School	76	$95,166	(21.9)	$1,252	5.0
Abbie Loveland Tuller	28	$53,563	(64.9)	$1,913	(39.9)
Abiding Savior School	21	$29,613	10.8	$1,410	(31.5)
ACCEL	44	$37,860	(8.5)	$860	12.3
Adobe Adventist Christian School	11	$10,265	(11.0)	$933	101.9
Adobe Montessori	1	$1,563	n/a	$1,563	n/a
Ahwatukee Foothills Montessori	7	$14,400	107.8	$2,057	11.0
Aldea Montessori	26	$54,455	52.7	$2,094	17.8
Alethein Classical Christian School	16	$15,106	(49.4)	$944	(39.9)
Al-Huda School	20	$61,900	31.0	$3,095	24.4
All Saints Catholic School	69	$164,000	n/a	$2,377	n/a
All Saints Episcopal Day School	67	$397,524	16.7	$5,933	(18.1)
American Indian Christian School	76	$127,786	(16.9)	$1,681	(26.8)
Angels in Training Learning Center	3	$2,546	(54.0)	$849	(38.6)
Annunciation Catholic School	8	$6,730	n/a	$841	n/a
Apostolic Faith Center Christian Academy	6	$10,125	(40.0)	$1,687	30.0
Arcadia Montessori School	6	$11,163	11.4	$1,861	(44.3)
Arizona Cultural Academy	78	$204,178	(31.5)	$2,618	7.2
Arizona International Academy	31	$44,400	(13.3)	$1,432	(32.9)
Arizona Lutheran Academy	134	$325,491	(2.1)	$2,429	12.6
Arrowhead Christian Academy	140	$165,745	(9.4)	$1,184	(12.6)
ASCEND	2	$5,000	n/a	$2,500	n/a
Ascension Lutheran School	45	$127,071	25.1	$2,824	53.0
Atonement Lutheran School	67	$129,349	(6.8)	$1,931	5.8
Awakening Seed School	15	$82,400	11.4	$5,493	41.1
Barness Family East Valley Jewish Community Center Day School	34	$79,215	(1.8)	$2,330	(39.3)
Beautiful Savior Academy	18	$32,364	18.1	$1,798	18.1
Bella Vista Private School	11	$29,390	(27.1)	$2,672	(13.9)
Bethany Christian School (Lake Havasu)	11	$10,768	12.5	$979	33.0
Bethany Christian School (Tempe)	264	$544,857	13.8	$2,145	0.8
Bethany Learning Center	44	$80,433	15.2	$1,828	15.2
Bible Christian Academy	74	$115,330	22.1	$1,559	(12.7)
Blessed Sacrament Kindergarten	8	$35,890	(22.8)	$4,486	(13.1)
Bourgade Catholic High School	392	$747,566	(14.5)	$1,907	(20.8)
Bridges Pre School & Kindergarten	2	$1,800	n/a	$900	n/a
Brophy College Preparatory	280	$1,301,257	(17.1)	$4,647	(17.4)
Calvary Baptist School	17	$13,954	(32.2)	$821	(24.3)
Calvary Chapel Christian School	99	$180,771	0.0	$1,826	(1.0)
Calvary Christian Academy (Lake Havasu City)	139	$206,978	(27.7)	$1,489	(25.1)

Calvary Christian Academy (Tempe)	1	$928	(38.0)	$928	(38.0)
Calvary Christian School (Queen Creek)	55	$59,285	(11.4)	$1,078	(11.4)
Camelback Christian School	8	$15,768	114.5	$1,971	(46.4)
Camelback Desert School (Paradise Valley)	4	$3,058	(87.4)	$765	(81.1)
Camp Verde United Christian School	94	$95,340	(13.7)	$1,014	15.6
Canyon State Academy	1	$9,698	n/a	$9,698	n/a
Cardon Christian Academy	32	$35,810	(1.9)	$1,119	(5.0)
Casas Christian School	369	$715,112	4.2	$1,938	18.3
Casas Ninos School of Montessori	2	$1,710	(26.0)	$855	(1.7)
Castlehill Country Day School	35	$66,003	(30.6)	$1,886	(12.8)
Cathedral of Praise Christian School	3	$2,260	(52.5)	$753	(52.5)
Cave Creek Montessori	12	$17,338	n/a	$1,445	n/a
Chandler Christian School	93	$173,675	(6.3)	$1,867	17.9
Chaparral Church Kindergarten	17	$23,279	(25.8)	$1,369	(25.9)
Chapel in the Hills	51	$38,301	(3.0)	$751	(31.5)
Chinle Adventist Elementary School	7	$1,000	n/a	$143	n/a
Christ Church School	12	$35,040	83.9	$2,920	(23.4)
Christ Greenfield Lutheran School	143	$401,610	1.2	$2,808	17.4
Christ Lutheran School	208	$390,916	2.6	$1,879	(6.2)
Christ the King Academy	6	$9,872	161.6	$1,645	30.8
Christ the King Catholic School	108	$211,861	(0.8)	$1,962	98.6
Christ the Redeemer Lutheran	60	$51,600	(32.3)	$860	(32.3)
Christian Academy of Prescott	142	$159,596	(10.2)	$1,124	(11.5)
Chrysalis Academy	3	$5,950	(25.8)	$1,983	(25.8)
Community Montessori School	9	$16,150	50.9	$1,794	(16.2)
Congregation Anshei Israel	7	$9,444	(47.6)	$1,349	(62.6)
Copper Canyon Christian School	2	$891	(1.0)	$445	(1.1)
Cornerstone Christian Academy (Chandler)	1	$360	0.0	$360	0.0
Cornerstone Christian Academy (Cottonwood)	7	$9,884	(35.2)	$1,412	(35.2)
Cornerstone Christian Academy (Tucson)	39	$48,524	(86.1)	$1,244	(41.5)
Cornerstone Kidz	5	$6,740	n/a	$1,348	n/a
Covenant Child Care Center	1	$920	n/a	$920	n/a
Creative Castle PreSchool & Kindergarten	6	$10,076	n/a	$1,679	n/a
Cross of Glory Lutheran School	23	$45,569	14.3	$1,981	14.3
Cross Roads Preschool & Kindergarten	1	$1,800	(45.0)	$1,800	10.0
Crossroads Community School	101	$163,670	(5.8)	$1,621	1.6
Dayspring Kindergarten	37	$70,434	10.7	$1,904	(13.2)
Desert Christian Schools	536	$990,847	(1.0)	$1,849	(2.3)
Desert Garden Montessori	54	$121,593	13.1	$2,252	(7.8)
Desert Montessori	5	$4,750	(22.5)	$950	(58.5)
Desert Shadows Montessori	4	$7,750	(0.4)	$1,937	(25.4)

Desert Sky Montessori	4	$2,700	200.0	$675	50.0
Desert Sun Child Development Center	31	$46,707	(29.8)	$1,507	(29.8)
Desert Valley Christian School	29	$32,529	79.5	$1,122	302.2
Desert View Learning Center	34	$114,850	15.9	$3,378	(21.6)
Desert Voices Oral Learning Center	5	$57,968	(43.4)	$11,594	(32.1)
Desert Willow Educational Services	2	$3,060	(5.8)	$1,530	41.3
Dobson Montessori School	59	$76,401	(33.8)	$1,295	(5.8)
Dove Christian School	23	$30,955	(35.5)	$1,346	13.2
Dynamite Montessori	34	$26,356	(2.5)	$775	8.8
East Fork Lutheran School	90	$35,153	(23.9)	$391	(28.1)
East Valley Christian Academy	2	$3,496	153.3	$1,748	153.3
El Dorado Private School	12	$24,048	(18.0)	$2,004	(11.2)
Emmanuel Christian Academy	22	$19,860	(42.8)	$903	(24.6)
Emmanuel Evangelical Lutheran School	118	$146,795	3.0	$1,244	3.0
Emmaus Lutheran School	56	$72,081	3.2	$1,287	(11.5)
Ethos School	2	$25,113	n/a	$12,557	n/a
Faith Christian School	52	$44,672	(40.0)	$859	(40.0)
Faith Community Academy	66	$84,803	(13.9)	$1,285	(13.9)
Faith Lutheran School	55	$94,056	60.7	$1,710	31.5
Family Life Academy	110	$131,631	32.9	$1,197	(29.9)
Family of God Lutheran School	12	$19,341	17.9	$1,612	37.5
Fellowship Children's Development Center	8	$12,141	(1.1)	$1,518	(25.8)
Firm Foundations	56	$41,620	(15.8)	$743	(26.3)
First Baptist Christian Academy	55	$70,038	(7.4)	$1,273	12.8
First Southern Christian School	76	$89,022	(1.0)	$1,171	(24.5)
Flagstaff Community Christian School	35	$96,342	(16.1)	$2,753	(56.8)
Florence Baptist Academy	4	$3,238	134.6	$809	75.9
Foundation of Blind Children PreSchool	7	$133,990	120.5	$19,141	89.0
Fountain of Life Lutheran School	93	$114,017	(29.2)	$1,226	(7.9)
Freedom Christian Academy	49	$78,077	9.4	$1,593	18.3
Freedom Christian School (Arizona City)	7	$8,868	118.2	$1,267	(6.5)
Gateway Academy	5	$22,140	n/a	$4,428	n/a
Gateway Baptist Academy	43	$26,014	8.4	$605	28.7
Gethsemane Lutheran School	120	$215,710	(5.0)	$1,798	(14.5)
Gilbert Christian Schools	365	$689,504	n/a	$1,889	n/a
Gilson Wash Baptist School	6	$8,642	5.6	$1,440	40.8
Glendale Christian Academy	88	$92,322	(41.9)	$1,049	(10.9)
Glenview Adventist School	67	$61,931	(4.7)	$924	16.5
Good Shepherd Lutheran School	8	$6,060	(63.3)	$757	(35.8)
Gospel Light Christian Academy	2	$1,287	(28.5)	$643	7.2
Grace Christian School	5	$2,315	(42.1)	$463	(42.1)
Grace Community Christian School	268	$611,957	(8.9)	$2,283	(42.1)
Grace Fellowship Academy	49	$73,324	(10.8)	$1,496	36.5

Grace Lutheran School	99	$123,161	1.1	$1,244	(4.0)
Graysmark Academy	9	$10,305	186.3	$1,145	(4.6)
Green Fields Country Day School	48	$251,488	12.7	$5,239	(6.1)
Guiding Light Christian Partnership	13	$6,398	218.3	$492	(2.2)
Guiding Light School	12	$31,532	(18.6)	$2,628	15.4
Hand in Hand Christian School	14	$16,660	102.7	$1,190	15.9
Harvest Christian Academy	10	$11,730	(20.7)	$1,173	(28.6)
Heritage Christian Academy	91	$144,406	(26.2)	$1,587	(5.1)
Heritage Montessori	2	$4,988	n/a	$2,494	n/a
Highland Free School	20	$9,615	(19.9)	$481	(7.9)
Holbrook Indian School	46	$14,217	(24.3)	$309	34.9
Holy Angel School	58	$133,701	11.1	$2,305	22.5
Holy Cross Evangelical Lutheran School	4	$3,380	(57.8)	$845	(4.9)
Holy Trinity Academy	17	$41,576	14.4	$2,446	(32.7)
Hopi Mission School	71	$220,805	18.2	$3,110	33.2
Howard S. Gray Education Center	2	$11,700	(19.3)	$5,850	(19.3)
Imago Del Middle School	42	$143,183	(27.5)	$3,409	(36.1)
Immaculate Conception School	77	$106,454	26.3	$1,383	49.4
Immaculate Heart Schools	200	$340,382	6.3	$1,702	(14.9)
International Christian Academy Online	3	$2,226	303.3	$742	34.4
International School of Arizona	17	$63,757	41.0	$3,750	74.2
International School of Tucson	38	$74,916	(0.2)	$1,971	(18.6)
Jess Schwartz Jewish Community High School	134	$452,642	30.8	$3,378	(53.1)
Joanne Todd Christian School	24	$24,052	(14.0)	$1,002	3.9
Journeys Academy	1	$3,150	(40.0)	$3,150	117.2
Joy Community Christian School	277	$567,332	(3.9)	$2,048	(9.1)
Joyful Beginnings Academy	16	$42,101	0.6	$2,631	(12.0)
Keystone Montessori	21	$47,998	(32.2)	$2,286	(12.8)
Khalsa Montessori School	10	$13,844	(47.8)	$1,384	(16.5)
King David School	12	$88,735	(91.0)	$3,228	(42.2)
Kino Learning Center	16	$45,617	(51.1)	$2,851	(42.0)
Lamad Preparatory Academy	1	$460	(69.2)	$460	(1.6)
Lamb's Gate Kindergarten	40	$60,733	24.0	$1,518	(13.2)
Lauren's Institute for Education	8	$40,455	764.4	$5,057	116.1
Legacy Classical Christian Academy	56	$84,560	39.1	$1,510	(0.7)
Lestonnac Kindergarten	9	$8,216	(32.0)	$913	(9.4)
Life Development Institute	2	$41,700	81.3	$20,850	81.3
Logos Academy	3	$6,494	n/a	$2,165	n/a
Loretto School	66	$140,419	120.7	$2,128	57.2
Lourdes Catholic School	48	$99,277	(10.8)	$2,068	(38.7)
Maranatha Christian Academy	1	$1,144	(56.6)	$1,144	30.3
Maricopa Village Christian School	16	$6,700	17.5	$419	(26.5)
Martin Luther School	85	$138,488	(3.6)	$1,629	(8.1)
Mesa Montessori	3	$4,545	(19.8)	$1,515	60.3
Millennium Worldwide Academy	5	$17,500	(58.7)	$3,500	15.5
Mission Christian School	34	$22,810	(83.4)	$671	(60.4)

Mission Montessori School	34	$35,863	36.8	$1,055	20.7
Mission View Academy	1	$276	n/a	$276	n/a
Montessori Center School	8	$42,455	(22.0)	$5,307	7.3
Montessori Children House	10	$50,280	37.4	$5,028	23.6
Montessori Christian Academy	10	$19,805	19.6	$1,981	(28.2)
Montessori Day School	60	$12,600	(33.7)	$210	(70.2)
Montessori Educare Academy	11	$22,568	n/a	$2,052	n/a
Montessori in the Park	1	$180	(99.1)	$180	(81.6)
Montessori International	35	$102,544	28.2	$2,930	10.4
Montessori Kingdom of Learning	79	$130,499	41.7	$1,652	(13.9)
Montessori Learning Center	2	$3,000	(9.8)	$1,500	35.4
Montessori West Preparatory School	11	$22,206	(15.6)	$2,019	(2.5)
Morning Glory Montessori	7	$13,395	64.0	$1,914	(29.7)
Most Holy Trinity Catholic School	119	$190,969	(4.8)	$1,605	(20.8)
Mount Calvary Lutheran School	45	$53,173	12.2	$1,182	4.8
Mountain Christian School	50	$131,360	11.9	$2,627	16.4
Navajo Lutheran Mission School	77	$200,686	(22.4)	$2,606	(18.3)
Nehemiah Ministries	1	$184	(88.2)	$184	(76.5)
Nellie P. Covert School	27	$37,000	(18.0)	$1,370	(36.2)
Neurological Music Therapy Services	5	$10,755	108.8	$2,151	(16.5)
New Covenant Child Development	10	$22,840	(33.4)	$2,284	(53.4)
New Horizons Academy	10	$40,800	25.9	$4,080	13.3
New Vistas Academy	24	$78,148	60.1	$3,256	13.4
New Way Learning Academy	26	$205,367	0.6	$7,899	(22.6)
Noah's Ark Kindergarten	4	$9,720	(56.4)	$2,430	52.5
Nogales Christian Academy	5	$500	n/a	$100	n/a
North Phoenix Baptist Kindergarten	16	$21,492	57.8	$1,343	18.3
North Valley Christian Academy	77	$155,072	38.5	$2,014	17.3
Northminster Christian School	17	$20,594	19.0	$1,211	4.9
Northwest Christian School	1,006	$1,585,390	(4.8)	$1,576	1.6
Notre Dame Preparatory High School	261	$599,353	(34.7)	$2,296	(28.3)
Orme School	31	$125,521	(9.7)	$4,049	(18.5)
Our Lady of Guadalupe	9	$15,702	n/a	$1,745	n/a
Our Lady of Joy School	15	$66,296	33.3	$4,420	202.1
Our Lady of Mount Carmel School	284	$352,406	(10.8)	$1,241	(25.8)
Our Lady of Perpetual Help School (Glendale)	240	$322,552	(31.6)	$1,344	(25.9)
Our Lady of Perpetual Help School (Scottsdale)	186	$359,240	(12.5)	$1,931	73.7
Our Lady of Sorrows Academy	24	$22,850	(48.2)	$952	(15.9)
Our Mother of Sorrows	186	$239,059	4.1	$1,285	2.4
Our Savior's Lutheran School	64	$17,958	n/a	$281	n/a
Our Saviour Lutheran School	26	$40,191	(14.2)	$1,546	(20.8)
Page Christian School	4	$8,698	(4.6)	$2,175	(4.5)
Palms Elementary	11	$17,315	24.4	$1,574	13.1
Paradise for Tots Christian Kindergarten	7	$11,840	343.8	$1,691	(36.6)
Paradise Valley Christian	290	$622,781	1.8	$2,148	13.4

Pardes Jewish Day School	148	$502,901	(16.9)	$3,398	(30.4)
Parker Apostolic Christian School	5	$2,988	(48.9)	$598	(59.1)
Parkway Children's School of Excellence	1	$460	(95.7)	$460	(91.4)
Patagonia Montessori	1	$4,050	n/a	$4,050	n/a
Payson Community Christian School	74	$112,524	(27.8)	$1,521	(9.8)
Peridot Lutheran School	1	$1,750	0.0	$1,750	0.0
Phillips Christian School	8	$4,782	18.1	$598	3.3
Phoenix Christian School K-8	83	$166,108	5.1	$2,001	2.9
Phoenix Christian Unified	365	$676,165	(15.5)	$1,853	(12.7)
Phoenix Christian Unified Elementary (Goodyear)	74	$116,139	13.8	$1,569	(0.1)
Phoenix Country Day School	47	$283,148	6.4	$6,024	(2.6)
Phoenix Hebrew Academy	154	$756,428	(4.1)	$4,912	(7.8)
Phoenix Metro Islamic School	145	$235,779	(48.8)	$1,626	(38.5)
Pieceful Solutions	2	$5,155	n/a	$2,577	n/a
Pilgrim Lutheran School	52	$64,836	1.3	$1,247	5.2
Pleasantview Christian Elementary	4	$4,894	189.9	$1,223	(27.5)
Pope John XXIII Catholic School	208	$277,634	7.5	$1,335	(26.1)
Precious Lamb Christian School	14	$36,660	28.8	$2,619	38.0
Prescott Adventist School	9	$8,865	46.7	$985	144.4
Primavera School	30	$77,468	2.7	$2,582	(11.0)
Providence Classical School	63	$86,064	(17.7)	$1,366	(26.9)
Pusch Ridge Christian Academy	580	$1,263,239	32.0	$2,178	1.3
Quality Interactive Montessori	1	$1,800	n/a	$1,800	n/a
Queen of Peace School	106	$183,498	35.7	$1,731	(7.8)
Rancho Solano (Gilbert)	2	$5,723	(55.4)	$2,861	(33.1)
Rancho Solano (Glendale)	2	$2,840	(46.3)	$1,420	7.5
Rancho Solano (Phoenix)	4	$14,000	n/a	$3,500	n/a
Rancho Solano (Scottsdale)	246	$535,633	76.6	$2,177	2.6
Red Mountain Montessori	1	$900	(81.1)	$900	(43.3)
Red Rock Christian School	13	$15,832	23.4	$1,218	108.9
Redeemer Christian Academy	7	$12,350	(11.3)	$1,764	26.7
Redeemer Christian School	60	$115,244	28.7	$1,921	26.5
Redeemer Lutheran School	101	$179,945	(1.3)	$1,782	0.6
Resurrection Lutheran Child Development Center	17	$69,160	14.3	$4,068	0.8
Risen Savior Lutheran School	65	$166,190	117.2	$2,557	80.5
River of Life Christian Academy	50	$64,599	61.4	$1,292	38.8
Sacred heart School (Nogales)	133	$48,699	12.4	$366	78.5
Sacred Heart School (Prescott)	68	$389,785	(6.8)	$5,732	48.1
Safford Adventist Christian School	6	$3,500	(31.4)	$583	(8.5)
Safford Christian School	17	$21,333	(31.9)	$1,255	(7.8)
Saguaro Hills Adventist Christian School	20	$18,129	(39.8)	$906	41.6
Saguaro Hills Christian School	21	$21,309	(47.9)	$1,015	(10.7)
Sahuarita Christian Academy	89	$135,590	97.5	$1,523	(17.9)
Salpointe Catholic High School	528	$1,222,807	4.2	$2,316	(4.5)
San Francisco di Asis	68	$237,953	(5.3)	$3,499	146.4

San Miguel Catholic High School	101	$238,391	8.2	$2,360	1.7
San Xavier Indian School	90	$267,282	(1.1)	$2,970	(1.1)
Santa Cruz Catholic School	86	$145,106	(13.1)	$1,687	(10.1)
Satori	37	$70,216	7.2	$1,898	4.3
Scottsdale Christian Academy	580	$1,160,421	7.4	$2,001	3.6
Scottsdale United Methodist Kindergarten	2	$3,970	24.1	$1,985	24.1
Sedona Montessori School	1	$1,000	n/a	$1,000	n/a
Seton Catholic High School	372	$757,578	19.8	$2,037	(11.7)
Shalom Montessori School	17	$49,690	119.4	$2,923	(9.7)
Shearim Torah High School	14	$74,320	60.4	$5,309	(31.2)
Sheila's Christian Academy	5	$9,908	65.7	$1,982	(33.7)
Shepherd of the Desert Lutheran School	78	$155,709	59.0	$1,996	46.8
Shiloh Christian School	19	$26,250	(38.7)	$1,382	29.2
Sonshine Christian School	7	$5,838	27.2	$834	(27.3)
Southwest Christian School	25	$32,323	(47.0)	$1,293	(13.0)
Southwestern Christian School	159	$198,911	(10.9)	$1,251	(18.4)
Spectrum Private School	3	$7,898	104.1	$2,633	104.1
Spirit of Hope Montessori School	12	$16,682	(38.8)	$1,390	(49.0)
SS Peter & Paul Catholic School	331	$303,345	9.3	$916	(34.0)
SS Simon & Jude Catholic School	329	$462,153	(9.4)	$1,405	(23.1)
St Agnes Catholic School	184	$213,422	(17.0)	$1,160	(35.5)
St. Alban's Kindergarten	1	$900	(74.3)	$900	(74.3)
St Ambrose Catholic School	226	$152,252	(22.0)	$674	1.2
St Andrews Presbyterian Pre-School & Kindergarten	75	$60,681	(8.2)	$809	(60.8)
St Anthony of Padua School	88	$136,366	(8.1)	$1,550	(3.9)
St. Anthony (Pinetop)	9	$25,880	(74.5)	$2,876	18.8
St. Anthony Catholic (Show Low)	44	$115,800	n/a	$2,632	n/a
St Augustine High School	101	$224,195	(5.3)	$2,220	4.1
St Catherine of Siena School	199	$346,635	(8.6)	$1,742	(28.8)
St Charles Apache School	96	$276,611	(2.9)	$2,881	2.2
St Cyril's Catholic School	141	$314,221	0.8	$2,229	5.8
St Daniel the Prophet School	67	$160,971	(3.4)	$2,403	47.1
St. Dominic Savio Academy	2	$12,960	n/a	$6,480	n/a
St Elizabeth Ann Seton	464	$429,917	40.4	$927	(28.5)
St Francis of Assisi School	99	$130,593	63.1	$1,319	20.2
St Francis Xavier Elementary School	205	$432,874	(1.1)	$2,112	79.6
St Gregory Catholic School	168	$364,721	(7.2)	$2,171	28.2
St Gregory College Prep	114	$440,157	(4.1)	$3,861	(15.9)
St Jerome K-8 School	131	$168,118	(23.2)	$1,283	(23.8)
St John Bosco School	179	$387,930	1.5	$2,167	104.6
St John the Evangelist	134	$249,536	(8.7)	$1,862	14.4
St John Vianney Catholic School	149	$209,200	(40.5)	$1,404	(18.6)
St Joseph's Catholic School	38	$149,840	(31.2)	$3,943	576.3
St Joseph School (Tucson)	134	$174,335	27.5	$1,301	(58.2)
St Louis the King School	263	$320,764	(5.9)	$1,220	(18.0)

St Luke's	7	$26,450	(41.0)	$3,779	9.6
St Maria Goretti Kindergarten	22	$67,467	(6.3)	$3,067	23.3
St. Mark's Methodist	22	$19,835	(0.5)	$902	(50.2)
St. Mark's Presbyterian Kindergarten	15	$25,575	143.6	$1,705	(51.3)
St. Mary-Basha Catholic School	411	$512,358	14.7	$1,247	(4.8)
St Mary's High School	820	$1,518,665	(2.1)	$1,852	(26.2)
St Matthew School	179	$230,310	3.2	$1,287	(53.9)
St Maximillian Mary Kolbe School	43	$84,456	5.1	$1,964	(2.2)
St Michael's Indian School	256	$206,709	(6.9)	$807	(36.0)
St Michael's Parish Day School	160	$295,764	(40.3)	$1,849	(35.0)
St Paul's Preparatory Academy	9	$151,277	(17.7)	$16,809	375.6
St Peter Mission School	132	$200,285	0.2	$1,517	53.4
St Theresa Catholic School	204	$368,328	5.3	$1,806	72.3
St Thomas Aquinas	123	$352,427	(5.5)	$2,865	73.5
St Thomas Lutheran School	8	$8,683	(79.7)	$1,085	(54.3)
St Thomas the Apostle School	164	$317,799	(13.4)	$1,938	107.9
St Timothy's Catholic Academy	108	$235,883	(15.3)	$2,184	40.5
St Vincent de Paul School	282	$322,535	0.5	$1,144	(28.0)
Summit School of Ahwatukee	70	$170,588	(30.1)	$2,437	(23.1)
Sun & Shield Christian Academy	74	$61,756	(7.1)	$835	(0.7)
Sun Valley Indian School	16	$13,013	(18.6)	$813	(38.5)
Sunrise Montessori School	21	$50,882	12.1	$2,423	6.7
Surrey Garden Christian School	1	$450	(99.9)	$450	(78.5)
Tanque Verde Lutheran Kindergarten	25	$72,357	15.1	$2,894	10.5
Tempe Montessori School	29	$86,758	11.7	$2,992	34.8
Tesseract School	78	$229,598	309.2	$2,944	(10.8)
The Caepe School	21	$23,635	330.5	$1,125	23.0
The Family School	23	$88,621	(31.6)	$3,853	4.1
The Learning Pod	3	$2,564	(69.5)	$855	(49.1)
Thunderbird Adventist Academy	116	$202,236	17.4	$1,743	111.5
Thunderbird Christian Elementary	76	$76,864	32.5	$1,011	55.1
Tree of Life Christian School	9	$20,990	508.4	$2,332	305.6
Tri-City Christian Academy	211	$307,962	8.6	$1,460	(5.3)
Trinity Christian School (Chino Vall)	14	$34,388	(84.5)	$2,456	56.5
Trinity Christian School (Mesa)	15	$19,034	(21.7)	$1,269	4.4
Trinity Christian School (Prescott)	132	$201,196	n/a	$1,524	n/a
Trinity Lutheran	177	$294,692	7.9	$1,665	23.2
Trinity Pre-school & Kindergarten	10	$18,603	18.4	$1,860	6.5
Trinity United Methodist Kindergarten	16	$21,171	(27.4)	$1,323	(41.0)
Tucson Community School	25	$33,325	(15.1)	$1,333	(4.9)
Tucson Hebrew Academy	94	$531,433	(19.4)	$5,654	(15.1)
Tucson Waldorf School	63	$145,207	333.6	$2,305	(8.5)
Turning Point	8	$8,823	(89.2)	$1,103	(58.2)
Valley Baptist School	7	$2,300	(52.1)	$329	(52.0)
Valley Christian High School	327	$1,135,929	(4.9)	$3,474	1.3

Valley Classical Christian School	73	$119,201	(25.8)	$1,633	(2.4)
Valley Lutheran High School	222	$335,692	26.7	$1,512	(3.6)
Verde Valley Adventist School	15	$6,016	(42.3)	$401	100.5
Verde Valley Christian School (Cottonwood)	109	$139,993	(4.9)	$1,284	(4.0)
Verde Valley School (Sedona)	20	$84,445	12.7	$1,222	12.6
Veritas Christian Community School	89	$138,424	(5.0)	$1,555	(20.0)
Victorious Preschool & Kindergarten	4	$4,650	n/a	$1,163	n/a
Ville de Marie Academy	67	$83,171	(29.0)	$1,241	3.8
Vision Christian Academy	21	$19,871	5.7	$946	(4.3)
West Valley Adventist School	2	$1,100	(92.0)	$550	52.4
Western Hills Baptist School	1	$450	n/a	$450	n/a
White Mountain Montessori	13	$23,270	147.3	$1,790	71.1
Wickenburg Christian Academy	39	$59,492	(7.6)	$1,525	11.3
Wings on Words	6	$7,083	687.0	$1,181	31.2
Word of Life Early Learning Center	3	$7,157	(0.9)	$2,386	65.1
Xavier College Preparatory High	489	$1,090,524	14.6	$2,230	(22.9)
Yuma Adventist School	13	$14,860	13.4	$1,143	92.1
Yuma Catholic High School	198	$378,451	(6.2)	$1,911	0.9
Yuma Lutheran High School	232	$241,939	(3.7)	$1,043	(10.3)

APPENDIX V

SCHOLARSHIPS BY LOCATION OF PRIVATE SCHOOL

City/Town	#	$	% chg from 2008	Avg. Scholarship	% chg from 2008	Rank 2009	Rank 2008
Anthem	113	$204,074	51.2	$1,806	12.4	24	30
Apache Junction	2	$3,496	(38.7)	$1,748	84.0	27	53
Arizona City	7	$8,868	118.2	$1,267	(6.5)	46	40
Avondale	128	$352,427	(5.5)	$2,753	66.7	8	27
Bapchule	132	$200,285	0.2	$1,517	53.4	39	51
Benson	5	$2,315	(42.1)	$463	(42.1)	59	58
Buckeye	49	$73,324	(10.8)	$1,496	36.5	41	50
Camp Verde	94	$95,340	(13.7)	$1,014	15.6	51	56
Carefree	15	$66,296	(25.0)	$4,420	202.1	1	32
Casa Grande	91	$142,860	(3.7)	$1,570	(2.7)	34	29
Cave Creek	66	$81,614	(14.6)	$1,237	(13.3)	47	33
Chandler	1,688	$3,454,968	17.8	$2,047	(7.6)	18	11
Chinle	7	$1,000	n/a	$143	n/a	65	
Chino Valley	14	$34,388	(84.5)	$2,456	56.5	11	31
Clarkdale	2	$891	(1.0)	$445	(1.1)	60	63
Cottonwood	177	$310,515	(1.0)	$1,754	23.0	26	34
Douglas	75	$148,635	96.3	$1,982	54.5	21	42
Flagstaff	158	$428,268	(4.1)	$2,711	49.9	9	22
Florence	4	$3,238	134.6	$809	75.9	56	62
Fort Mohave	12	$19,341	17.9	$1,612	37.5	33	49
Gilbert	653	$1,308,162	(14.2)	$2,003	0.1	20	14
Glendale	1,202	$1,822,088	(12.6)	$1,516	(11.4)	40	24
Globe	58	$133,701	11.1	$2,305	22.5	12	18
Goodyear	252	$353,893	(31.5)	$1,404	(16.3)	43	26
Higley	74	$115,330	593.8	$1,559	21.9	35	44
Holbrook	46	$14,217	(24.3)	$309	34.9	63	65
Kingman	22	$19,860	(56.1)	$903	1.8	53	55
Kykotsmovi	71	$220,805	18.2	$3,110	33.2	6	8
Lake Havasu City	189	$264,335	(23.4)	$1,399	(24.9)	44	19
Laveen	16	$6,700	17.5	$419	(26.5)	61	60
Litchfield Park	191	$318,178	(9.4)	$1,666	38.1	32	46
Marana	74	$61,756	(7.1)	$835	(0.7)	54	57
Maricopa	9	$10,305	186.3	$1,145	(4.6)	49	47
Mayer	31	$125,521	(9.7)	$4,049	(18.5)	4	1
Mesa	777	$1,341,795	(0.4)	$1,727	26.3	28	39
Nogales	193	$154,314	(3.1)	$800	24.6	58	59
Oro Valley[14]	220	$417,440	548.4	$1,897	(47.0)	22	4
Page	4	$8,698	(4.6)	$2,175	(4.5)	16	10
Paradise Valley	183	$681,462	194.8	$3,724	1.5	5	3
Parker	14	$23,978	157.8	$1,713	84.2	30	54

[14] Pusch Ridge Christian School was previously mistakenly put into Oro Valley. It should have been in Tucson.

Patagonia	1	$4,050	n/a	$4,050	n/a	3	
Payson	74	$112,524	(27.5)	$1,521	(9.8)	38	25
Peoria	120	$202,875	11.6	$1,691	(6.9)	31	21
Peridot	65	$19,708	1026.2	$303	(82.7)	64	23
Phoenix	8,888	$17,996,736	(7.3)	$2,025	(5.5)	19	13
Pinetop-Lakeside	22	$49,150	(55.7)	$2,234	2.6	13	12
Prescott	390	$868,360	20.1	$2,227	(6.7)	14	7
Queen Creek	114	$162,762	17.7	$1,428	11.5	42	43
Rock Point	77	$200,686	(22.4)	$2,606	(18.3)	10	5
Safford	23	$24,833	(31.8)	$1,080	(8.0)	50	48
Sahuarita	89	$135,590	97.5	$1,523	(17.9)	37	20
San Carlos	102	$285,253	(2.6)	$2,797	4.1	7	6
Scottsdale	1,550	$3,366,638	3.7	$2,172	12.2	17	16
Sedona	21	$85,445	14.0	$4,069	8.6	2	2
Show Low	170	$374,946	38.3	$2,206	(3.2)	15	9
Sierra Vista	232	$398,712	(7.6)	$1,719	21.1	29	35
Sonoita	10	$11,730	(20.7)	$1,173	(28.6)	48	28
St. Michael	256	$206,709	(6.9)	$807	(36.0)	57	45
Sun Valley	16	$13,013	(18.0)	$813	(38.5)	55	41
Surprise	14	$24,472	15.7	$1,748	24.0	27	36
Tempe	1,310	$2,343,973	(20.8)	$1,789	(10.0)	25	15
Tucson	6,029	$10,938,705	(6.5)	$1,814	(4.9)	23	17
Whiteriver	90	$35,153	(23.9)	$391	(28.1)	62	61
Wickenburg	39	$59,492	(7.6)	$1,525	11.3	36	38
Willcox	24	$24,052	(27.3)	$1,002	3.0	52	52
Yuma	812	$1,104,386	1.1	$1,360	(1.4)	45	37

11/15/04; re 79 ORDER, Signed by Judge Earl H. Carroll on 8/2/05. (REW,) (Entered: 08/03/2005)

* * *

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[Pleading Omitted, Addendum Attached]

Respectfully submitted,

Alice Kloppel,

Committee Secretary

(Tapes and attachments on file in the Office of the Senate Secretary)

* * *

PETITIONER'S BRIEF

SUPREME COURT, U.S.
FILED
JUL 30 2010

Nos. 09-987, 09-991

In the Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION

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QUESTIONS PRESENTED

1. Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit causes them a personal, concrete, and particularized injury?

2. Is the Respondents' alleged injury—which is solely based on the theory that Arizona's Tuition Tax Credit reduces the state's revenue—too speculative to confer taxpayer standing, especially when considering that the credit reduces the state's financial burden for providing public education and is likely a catalyst for new sources of state income?

3. Given that the Arizona Supreme Court has authoritatively determined under state law, and consistent with federal law, that the money donated to tuition granting organizations under Arizona's Tuition Tax Credit is private, not state, money, can the Respondents establish taxpayer standing to challenge the decisions of private taxpayers as to where they donate their private money?

4. Does Arizona's Tuition Tax Credit satisfy the Establishment Clause because it is a neutral program under which funds flow to religious schools solely based on multiple layers of private choice?

PARTIES TO THE PROCEEDING

Petitioners are: 1) Arizona Christian School Tuition Organization ("ACSTO"), a School Tuition Organization granted intervention in this case, and 2) Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue. Respondents in support of petitioners are Arizona School Choice Trust ("ASCT"), a school tuition organization, and Luis Moscoso, and Glenn Dennard, two parents whose children have received scholarships from ASCT. These parties were also granted intervention.

Respondents are taxpayers Kathleen M. Winn, Maurice and Diane Wolfthal, and Lynn Hoffman.

CORPORATE DISCLOSURE STATEMENT

Petitioner Arizona Christian School Tuition Organization does not have parent companies and is not publicly held.

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[1] These excerpts are from a transcription of the full Ninth Circuit oral argument, which is available at: www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000001243.

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Abbreviations Key:

ACSTO App.	Appendix To ACSTO's Brief on the Merits
ACSTO Pet. App.	Appendix to ACSTO's Petition for Certiorari
ASCT Pet.	ASCT's Petition for Writ of Certiorari
ASCT Pet. App.	Appendix to ASCT's Petition for Certiorari
Cato Pet. Br.	Amicus Brief of The Cato Institute, *et al.*, In Support Of Petitioners
JA	Joint Appendix
Opp.	Brief in Opposition To Petitions for Certiorari
State App.	Appendix To State's Brief on the Merits

DECISIONS BELOW

The district court's ruling dismissing Respondents' complaint for failure to state a claim is reported at 361 F. Supp. 2d 1117 and reprinted in ACSTO Pet. App. 44a-59a. The Ninth Circuit panel opinion is reported at 562 F.3d 1002 and reprinted in ACSTO Pet. App. 1a-43a. The order denying the petitions for rehearing en banc, and the accompanying opinions concurring and dissenting from the order, appear at 586 F.3d 649 and are reprinted in ACSTO Pet. App. 62a-110a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on April 21, 2009, and denied timely petitions for rehearing en banc on October 21, 2009. Petitioners obtained an extension of time to file petitions for writ of certiorari, and timely filed petitions on February 18, 2010. This Court granted ACSTO's and the State's petitions on May 24, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Article III, § 2 of the United States Constitution is set out in ACSTO App. 1a. The First Amendment to the United States Constitution is set out in ACSTO Pet. App. 111a. The full text of A.R.S. § 43-1089, the tuition tax credit statute, is set out in ACSTO Pet. App. 112a-115a.

INTRODUCTION

Respondents in this case—Arizona taxpayers—attack an Arizona tax credit program that they believe violates the Establishment Clause of the First Amendment. The threshold question is whether they have Article III standing.

Crucially, Respondents do not allege, and have disclaimed, that the State has extracted and spent *their tax dollars* under this program. This is a necessary, but certainly not the sole, prerequisite to any claim of taxpayer "injury" in the Establishment Clause context. *See Doremus v. Bd. of Educ.*, 342 U.S. 429, 433-34 (1952) (no "direct pecuniary injury" where taxpayers could not allege that "they are, will, or possibly can be out of pocket because of" state statute mandating Bible reading in public schools); *Flast v. Cohen*, 392 U.S. 83, 106 (1968) ("The taxpayer's allegation in such cases would be that *his tax money* is being extracted and spent." (emphasis added)). Respondents' "injury" is nothing more than a policy disagreement with the Arizona legislature, a classic "generalized grievance" insufficient to confer Article III standing.

Respondents' standing theory suffers from additional fatal flaws: 1) their claimed injury (a "reduction" in state revenue "caused" by a tax credit) is speculative; 2) the tax credit does not appropriate any money or levy a tax; 3) there is no causal connection between their claimed injury and the complained of government action; and, 4) it is speculative that the relief they seek would provide them redress.

Respondents would bypass these many holes in their standing theory simply by claiming that "[u]nder *Flast* . . . state and federal taxpayers have federal court standing, *by virtue of their taxpayer status alone*, to challenge statutory spending programs alleged to violate the Establishment Clause." Appellants' Supp. Br. 5, 9th Cir. Case No. 05-15754, Dkt. No. 52 (emphasis added). But this Court recently held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006). This Court's cases require much more than taxpayers with strong feelings about the separation between church and state to confer standing, which is all we have here.

Respondents' position that they have standing ignores every taxpayer standing case decided both before and after *Flast*, and requires expanding *Flast* well beyond its narrow holding. The Ninth Circuit plainly erred in finding that they have standing.

STATEMENT OF THE CASE

A. Statement of Facts[2]

Arizona is a national leader in school choice. It offers free public schools, and requires school districts to open their enrollment to students living outside the district without charging tuition. A.R.S. § 15-816.01(A). It provides a free charter school

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[2] The facts material to the questions presented are not in dispute. ACSTO Pet. App. 88a n.7.

system, which was established to "provide additional academic choices for parents and pupils." A.R.S. § 15-181.[3] It also provides a "virtual academy," which offers an online, free public education. *See* Arizona Virtual Academy, www.k12.com/azva/. It gives parents the option of educating their children at home, pursuant to a permissive homeschooling policy. A.R.S. §§ 15-802, 15-803, 15-745. And the program challenged here, the private school tuition tax credit, "bring[s] private institutions into the mix of educational alternatives open to the people of [Arizona]." *Kotterman v. Killian*, 972 P.2d 606, 611 (Ariz. 1999).

Notably, Arizona law provides for dozens of tax credits, all of which "operat[e] in the same general way." *Id.* at 613. They include, among others, credits for: donations to organizations that assist the working poor, which includes many religious institutions, A.R.S. § 43-1088; motion picture production costs, § 43-1075; expenses incurred in installing solar energy devices, § 43-1083; donations of real property to a school district for a school site, § 43-1089.02; expenses incurred in purchasing pollution control equipment, § 43-1081; people who earn a low income, § 43-1073; and fees or contributions to support public school extracurricular activities, § 43-1089.01.

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[3] The current list of over 600 charter schools can be accessed at www.ade.state.az.us/charterschools/search/sitelist.asp.

In 1997, the Arizona Legislature enacted A.R.S. § 43-1089,[4] the tuition tax credit challenged herein. The credit allows Arizona taxpayers to donate private funds to a "school tuition organization" ("STO") of their choice. § 43-1089(A), ACSTO Pet. App. 112a. The taxpayer may then claim a credit on their state income tax for the amount donated, which is capped at $500 for individual filers and $1000 for married couples filing a joint return. §§ 43-1089(A)(1)-(3), ACSTO Pet. App. 112a. Taxpayers are not permitted to designate their dependent as the beneficiary of their contribution. § 1089(E), ACSTO Pet. App. 113a.

STOs must be "a charitable organization in this state that is exempt from federal taxation under § 501(c)(3) of the internal revenue code." § 43-1089(G)(3), ACSTO Pet. App. 115a. Anyone can form an STO. ACSTO Pet. App. 85a. STOs are mandated by statute to donate a minimum of ninety percent of their income to children who attend private schools. § 43-1089(G)(2)-(3), ACSTO Pet. App. 114a-115a. Any STO may provide scholarships to students to attend any school, and the only limitation is that they cannot provide scholarships to students of only one school. § 43-1089(G)(3), ACSTO Pet. App. 115a. Similar to any 501(c)(3) organization, STOs may support private religious schools, private nonreligious schools, or both. Many

[4] Several changes to the tax credit recently occurred. State App. 1-17. None of these changes impact the substantive constitutional questions raised in this appeal.

current STOs exclusively serve nonreligious schools.[5] In 2008, there were 55 STOs, 30 of which had no obvious religious affiliation. ASCT Pet. App. 223-24. These STOs dispensed scholarships to over 28,000 students at over 370 private schools. *Id.* at 208-09.

Under Arizona's tax credit program, the private choices of taxpayers, the STOs, and parents direct scholarship funds to students. ACSTO Pet. App. 52a-53a. The taxpayer chooses to donate or not, and if he donates, to which STO. *Id.* at 52a. The privately formed, 501(c)(3) STOs raise money to award scholarships to private schools. *Id.* at 52a-53a. Each parent is responsible for deciding which school his or her child attends, and to which STO to apply to for a scholarship. *Id.*

Not only are the funding choices private, the funds involved are private as well, as determined authoritatively by the Arizona Supreme Court. *Kotterman*, 972 P.2d at 618. That court also held that the tax credit was facially constitutional under the federal Establishment Clause. *Id.* at 616. This Court denied certiorari. 528 U.S. 921 (1999).

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[5] According to STO websites, and data obtained from the Arizona Department of Revenue regarding which schools STOs provide scholarships to, at least eight STOs limit their scholarships to students attending nonreligious schools: Arizona Independent Schools Scholarship Foundation, Schools with Heart Foundation, Arizona Waldorf Scholarship Fund, Tempe Montessori's Parents Organization, Dynamite Montessori Foundation, Life Development Institute Education Foundation, Just Friends of Education, and Montessori Centre School Tuition Organization. State App. 30-31.

B. Course of Proceedings

Respondents sued in Arizona federal District Court on February 15, 2000. Their complaint alleged that the tax credit violated the Establishment Clause of the United States Constitution both on its face (a claim subsequently abandoned) and as applied. ACSTO Pet. App. 118a. The district court dismissed the complaint pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The Ninth Circuit reversed. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002). This Court affirmed. *Hibbs v. Winn*, 542 U.S. 88 (2004).

Upon remand, the district court granted intervention to ACSTO, ASCT, and two parents whose children receive tax credit funded scholarships. The intervenors filed motions to dismiss the complaint, and the State Defendant filed a motion for judgment on the pleadings. On March 25, 2005, the district court granted ASCT's motion to dismiss, holding that Respondents' complaint failed to state an Establishment Clause claim. ACSTO Pet. App. 58a.

Respondents timely appealed on April 22, 2005. On April 21, 2009, the Ninth Circuit reversed the district court's dismissal and remanded the case so Respondents could pursue their as-applied challenge to the tax credit. The court noted that Respondents' "only allegation of injury from the allegedly unconstitutional operation of the [tax credit statute] arises from their status as Arizona taxpayers," yet

held that "they have standing under Article III." ACSTO Pet. App. 9a-10a.

ACSTO, ASCT, and the State Defendant filed timely petitions for rehearing en banc on May 14, 2009. The Ninth Circuit denied these petitions on October 21, 2009. Judge O'Scannlain, writing for seven other judges, dissented from the denial of rehearing en banc. He found that the tax credit program was fully consistent with *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002): because "The government does not direct any aid to any religious school. Nor does the government encourage, promote, or otherwise incentivize private actors to direct aid to religious schools. Rather, 'state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals.'" ACSTO Pet. App. 83a-84a (citation omitted).

SUMMARY OF THE ARGUMENT

To establish Article III standing, a plaintiff must demonstrate: a personal, concrete, and particularized injury; a causal link between the injury and the conduct complained of; and the likelihood that a favorable decision will redress the injury. Respondents (hereinafter "Taxpayer-Plaintiffs") fail each of these requirements.

Taxpayer-Plaintiffs do not allege, and expressly disclaim, one of several necessary prerequisites for taxpayers to satisfy Article III in the Establishment Clause context: that *their tax dollars* are being extracted and spent to support religion.

Taxpayer-Plaintiffs claimed "injury" also fails because it is not concrete or particularized, but rather is based on the alleged "right" to a government that complies with the Constitution. Such generalized grievances are not sufficient to confer Article III standing.

Taxpayer-Plaintiffs also are not challenging the appropriation of a certain sum of money, or the levy of a tax, that supports the tax credit program. Rather, they are challenging the individual decisions of thousands of taxpayers to make donations and take the credit.

Taxpayer-Plaintiffs' only alleged "injuries"—that the tax credit "reduces" state revenues and that this "reduction" increases their tax burden—are purely speculative. Tax credits often increase, rather than decrease, state revenues. And claiming that one's taxes are increased because of an alleged reduction in state revenues is merely speculation about how state lawmakers will respond to a revenue reduction. Speculation permeates every aspect of Taxpayer-Plaintiffs' reduced revenue theory of standing, which is the antithesis of proving a concrete injury, causation, or redressability.

Further, Taxpayer-Plaintiffs lack Article III standing because *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), conclusively determined as a matter of state law (and consistent with federal law) that the money generated by the tax credit is private, not state, money. Article III's role in preserving federalism and separation of powers is respected by

giving due deference to the Arizona Supreme Court's interpretation of its own state laws.

In addition to failing to establish the requirements of Article III standing, Taxpayer-Plaintiffs' complaint also fails to state an Establishment Clause claim under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The tax credit serves the purpose of providing access to a broad array of educational choices by defraying parents' educational costs. Such a purpose plainly satisfies *Lemon*'s secular purpose prong. *Mueller v. Allen*, 463 U.S. 388 (1983).

The tax credit is also a facially-neutral program that benefits a broad range of beneficiaries defined without reference to religion. Scholarships are awarded under the program based on the multiple private choices of taxpayers, 501(c)(3) organizations, and parents. Such a program is not readily subject to Establishment Clause challenge. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The district court correctly dismissed this case. The Ninth Circuit's decision to the contrary should be reversed.

ARGUMENT

For Taxpayer-Plaintiffs to prevail would require a drastic expansion in the law. Unable to satisfy any of the requirements for Article III standing set out in this Court's cases, they instead seek to expand the narrow exception to the general bar against taxpayer

suits set out in *Flast v. Cohen*, 392 U.S. 83 (1968). No such expansion is warranted here.

On the merits, Taxpayer-Plaintiffs admit the tax credit operates based on private choice. This private choice program in no way violates the Establishment Clause. This Court should reverse.

I. Taxpayer-Plaintiffs Lack Standing.

This Court has often observed that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) (citation omitted). This "case or controversy" requirement, so essential to preserving federalism and separation of powers, is enforced by Article III's standing doctrine. *Cuno*, 547 U.S. at 342.

To establish Article III standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* (citation omitted). These three requirements—personal injury, causation, and redressability—are "indispensable part[s] of [a] plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

This case involves the question of taxpayer standing, and it is "old and familiar ground" that Article III prevents federal taxpayers from bringing lawsuits challenging a specific expenditure of federal funds based solely on their status as taxpayers.

ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989). Federal taxpayers are barred from bringing such claims "because a taxpayer's 'interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention].'" *Id.* (quoting *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923)). This same "rationale . . . applies with undiminished force to state taxpayers," *Cuno*, 547 U.S. at 345, which is the type of challenge involved here.

Flast v. Cohen, 392 U.S. 83 (1968), created an exceedingly narrow exception that allows federal taxpayer suits under highly limited and specific circumstances in the Establishment Clause context.[6] Under *Flast*'s "nexus" test, a taxpayer must first establish a "logical link" between his taxpayer status and the "legislative enactment attacked." *Id.* at 102. This requires the taxpayer to challenge the expenditure of *his* funds pursuant to the

---

[6] *United States v. Richardson*, 418 U.S. 166, 173-74 (1974) (emphasizing the "narrowness of [*Flast*'s] holding" and that it only "slightly lowered" the bar on taxpayer lawsuits); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 481 (1982) (stressing the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied"); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (*Flast* created a "narrow exception"); *Cuno*, 547 U.S. at 348 (*Flast* has "a narrow application in our precedent"); *Hein*, 551 U.S. at 609 (noting that "in the four decades since its creation, the *Flast* precedent has largely been confined to its facts").

Constitution's taxing and spending clause. *Id.* Second, a "taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* This requires the taxpayer to demonstrate that Congress is exceeding a specific constitutional limitation on its powers. *Id.*

As set out below, in addition to Taxpayer-Plaintiffs' complaint failing to allege facts sufficient to establish any of Article III's standing requirements, their theory of standing also fails under every taxpayer standing decision before and after *Flast*, as well as under *Flast*'s "nexus" test. Indeed, *Flast* would have to be extended well beyond its modest holding for standing to be found here. Taxpayer-Plaintiffs therefore lack standing.[7]

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[7] Taxpayer-Plaintiffs addressed the standing argument raised in ACSTO's Petition for Certiorari in a short footnote in their Brief in Opposition. Opp. 14 n.4. Their response was that they have standing because this Court has ruled on the merits of Establishment Clause challenges to tax deductions, exemptions, and credits, citing *Mueller v. Allen*, 63 U.S. 388 (1983), *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), and *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). But standing was not raised or addressed in these cases. And it is well-settled that the Court's exercise of jurisdiction does not establish precedent that the Court had jurisdiction. *United States v. Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio"). It is also worth noting that in at least three cases prior to *Frothingham v. Mellon*, 262 U.S. 447 (1923), "the Court accepted jurisdiction in taxpayer suits without passing directly on the standing question." *Flast*, 392

A. The Taxpayer-Plaintiffs Have Not Suffered A Personal, Concrete, Or Particularized Injury, But Rather Allege A Mere Generalized Grievance That Is Purely Speculative.

The standing doctrine is concerned with whether the plaintiff has "a personal stake in the outcome of the controversy." *Flast*, 392 U.S. at 99. The "injury" component of the standing test assures a "personal stake" by requiring the plaintiff to show he "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (citation omitted). Accordingly, the requisite injury must be "concrete and particularized," and may not be "conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations omitted).

A "concrete" injury is "indispensible" because it "enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221 (1974). Similarly, a "particularized" injury requires a showing that the injury "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 561 n.1.

U.S. at 92 n.5. Yet the Court had no problem in *Frothingham* holding—after the question was properly presented—that plaintiffs did not have taxpayer standing, and establishing the general rule barring lawsuits based on taxpayer "injuries."

For the taxpayer-plaintiff in the Establishment Clause context, proving a "concrete and particularized" injury requires proof that he "has sustained or is immediately in danger of sustaining" a "direct pecuniary injury," not an injury that "he suffers in some indefinite way in common with people generally." *Doremus*, 342 U.S. at 434. Taxpayer-Plaintiffs here fail this test for several reasons. First, they do not allege that Arizona is extracting and spending *their money* in support of religion, which is a necessary predicate to any taxpayer "injury" in the Establishment Clause context. Second, their injury is not distinct from the general public as a whole, but rather is the oft-rejected generalized grievance of the "right" to have a government that acts in conformity with the Constitution. Third, they are not challenging the levy of a tax or the appropriation of any sum of tax money. Finally, the only injury they do allege—a "reduction" in State revenues—is entirely conjectural (and likely incorrect), and is thus inadequate to confer standing.

1. Taxpayer-Plaintiffs Do Not Allege, And Expressly Disclaim, That The Government Is Extracting And Spending Their Tax Money In Support Of Religion.

This Court has consistently stated that the necessary starting point for taxpayer-plaintiffs claiming Establishment Clause violations is to allege the extracting and spending *of the taxpayer's money* to support religion. *Hein*, 551 U.S. at 599 (taxpayer standing claims based on notion that "*having paid*

lawfully collected taxes into the Federal Treasury at some point, they have a continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution" (emphasis added)); *Cuno*, 547 U.S. at 347 (describing the necessary injury as "the right not to 'contribute three pence . . . for the support of any one [religious] establishment'"); *Valley Forge*, 454 U.S. at 478 (a taxpayer must allege injury "by virtue *of his liability for taxes*" (emphasis added)). While this Court has "consistently held that this type of interest is too generalized and attenuated to support Article III standing" by itself, *Hein*, 551 U.S. at 599, such an allegation is nonetheless a necessary predicate of any claimed taxpayer "injury."

Doremus illustrates this requirement. There, the plaintiff challenged a New Jersey requirement that teachers read five verses from the Old Testament at the beginning of each public-school day. The *Doremus* Court stated that to establish standing the taxpayer-plaintiffs needed to allege a "good-faith pocketbook action." 342 U.S. at 434. They failed because they gave "[n]o information . . . as to what kind of taxes [they] paid . . . and *there is no averment* that the Bible reading increases any tax they do pay or *that as taxpayers they are, will or possibly can be out of pocket because of it*." *Id.* at 433 (emphasis added). The plaintiffs' failure to identify a "direct dollars-and-cents injury" *that affected their pocketbook* doomed their standing. *Id.* at 434.

Stating that its decision was consistent with *Doremus*, the *Flast* Court likewise held that the

necessary predicate of its "nexus" test was that *the taxpayer-plaintiff's money* was extracted and spent in support of religion: "*The taxpayers' allegation in such cases would be that his tax money is being extracted and spent* in violation of specific constitutional protections against such abuses of legislative power." 392 U.S. at 102, 105-106 (emphasis added).

In sum, taxpayer standing cases focus on the personal injury to the taxpayer—which is the extraction and spending of *his* money in support of religion[8]—not on whether the State is "losing" money (which is a highly speculative claim here). But what do Taxpayer-Plaintiffs allege? Nothing as to their own pocketbooks, but instead that the state is losing money. ACSTO Pet. App. 126a ("Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program"). Taxpayer-Plaintiffs are focusing on the wrong pocketbook, and they cannot prove that the state's pocketbook is actually short any money. *See* § I.A.5.a.

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[8] Even this necessary aspect of a claim of taxpayer standing is in considerable tension with Article III's requirement that an injury be personal, concrete, and particularized. As the plurality noted in *Hein*, "[i]n light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm." 551 U.S. at 593. Such an allegation is much more akin to the "generalized grievance" rejected in *Valley Forge*, 454 U.S. at 482-83.

From the standpoint of personal pocketbook injury, the tax credit here operates similarly to a tax exemption: it does not extract and spend a taxpayer's money, but rather gives benefits to third parties.[9] In *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970), this Court held that tax exemptions to churches do not transfer public funds out of the treasury: "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." Justice Brennan further explained this important distinction in his concurrence in *Walz*:

> Tax exemptions and general subsidies . . . are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise *and uses resources exacted from taxpayers as a whole*. An exemption, on the other hand, involves no such transfer.

Id. at 690 (Brennan, J., concurring) (emphasis added) (citation omitted). *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 43 (1989) ("We have not treated [tax exemptions and subsidies] as

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[9] There is no meaningful distinction, for constitutional purposes, between tax credits, deductions, and exemptions. Each is a "legitimate tool[] by which government can ameliorate the tax burden while implementing social and economic goals." *Kotterman*, 972 P.2d at 613.

equivalent, however, in the Establishment Clause context, and with good reason. 'In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions'") (Scalia, J., dissenting) (citation omitted). Put simply, a tax credit, like an exemption, is not a personal pocketbook injury because the taxpayer is not being compelled to give *his* tax money in support of religion. Accordingly, Taxpayer-Plaintiffs have suffered no personal injury.

Indeed, their standing to sue is foreclosed because nowhere in their complaint do they allege that Arizona is extracting their tax dollars and spending them to support religion. Taxpayer-Plaintiffs here are no different than the plaintiffs in *Doremus*, who could not prove any "direct pecuniary injury," but rather only that they suffered "in some indefinite way in common with people generally." 342 U.S. at 434. Such generalized grievances are neither concrete nor particularized, and thus are insufficient to support Article III standing. *See* § I.A.2., *infra*.

Further, Taxpayer-Plaintiffs cannot show the requisite personal harm because they have specifically disclaimed that the tax credit imposes any tax on them. When this case previously came before this Court regarding whether the Tax Injunction Act barred their claim, Taxpayer-Plaintiffs argued that the Act was inapplicable

because they were not complaining about any tax *imposed on them*:

> The Act was meant to prevent state taxpayers from using the federal courts to prevent the state from imposing or collecting taxes from them. Constitutional challenges to state tax credits, deductions and similar tax benefits, however, are not suits by taxpayers seeking to postpone or avoid the payment of state taxes. Such suits thus do not seek to "enjoin, suspend or restrain" the "assessment, levy or collection" of taxes.

Respondents' Br. 11, S. Ct. Case No. 02-1809, Dec. 19, 2003. This Court agreed, noting that Taxpayer-Plaintiffs' lawsuit is a "[t]hird party suit" which does not "seek[] to stop the collection (or contest the validity) of a tax" imposed on them. *Hibbs v. Winn*, 542 U.S. 88, 104 (2004). Like the taxpayer-plaintiffs whose standing this Court rejected in *Doremus*, Taxpayer-Plaintiffs seek to litigate a "grievance [that] is not a direct dollars-and-cents injury but is a religious difference." 342 U.S. at 434.

2. Taxpayer-Plaintiffs' Injury Is Neither Concrete Nor Particularized, But Rather Is A Generalized Grievance Insufficient To Confer Standing.

Article III does not extend to "generalized grievances," like Taxpayer-Plaintiffs' claimed injury here, which are based on the personal "right" to have

the government obey (one's view of) the Constitution. *Valley Forge*, 454 U.S. at 482-83 ("This Court repeatedly has rejected claims of standing predicated on 'the right . . . to require that the Government be administered according to law" (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)); *Schlesinger*, 418 U.S. at 217 (interest in "nonobservance of the [Constitution]" affects "only the generalized interest of all citizens" and therefore "is an abstract injury" insufficient to satisfy Article III).

Valley Forge rejected a taxpayer "injury" in the Establishment Clause context as a generalized grievance. Although the taxpayer-plaintiffs in *Valley Forge* alleged the improper use of *their* tax dollars, 454 U.S. at 469, this Court nonetheless concluded that their complaint asserted a generalized grievance.

> Plaintiffs have no reason to expect, nor perhaps do they care about, any personal tax saving that might result should they prevail. The crux of the interest at stake, the plaintiffs argue, is found in the Establishment Clause, not in the supposed loss of money as such. As a matter of primary identity, therefore, the plaintiffs are not so much taxpayers as separationists . . . .

Id. at 482 (citation omitted). Taxpayer-Plaintiffs are no different. They disclaim that the tax credit extracts and spends their money on religion, and their allegations of "reduced" revenue are pure speculation, *see* § I.A.5., *infra*. They are, like the

plaintiffs in *Valley Forge*, separationists who allege nothing more than a desire to see the government obey what they think the Establishment Clause commands.

Finding such allegations indistinguishable from the claims of "citizen standing" rejected in *Schlesinger* and *Richardson*, the Court in *Valley Forge* held that:

> The complaint in this case shares a common deficiency with those in *Schlesinger* and *Richardson*. Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . .

454 U.S. at 485. The harm claimed under such circumstances is "plainly undifferentiated and 'common to all members of the public,'" and thus is not a concrete harm that affects a plaintiff in a personal and individual way. *Richardson*, 418 U.S. at 177 (citation omitted).

Plainly, a finding that Article III is satisfied here would directly conflict with *Richardson*, *Schlesinger*,

and *Valley Forge*'s holdings that generalized grievances are not cognizable Article III injuries.

3. Arizona's Tuition Tax Credit Appropriates No Sum Of Tax Money And Levies No Tax To Implement The Scholarship Program.

Taxpayer-Plaintiffs also fail to satisfy Article III's injury requirement because the tax credit neither appropriates any sum of money, nor imposes any tax. *Hein* and *Flast* require such allegations. *Hein*, 551 U.S. at 603 (only "expenditures . . . made pursuant to an express congressional mandate and a specific congressional appropriation" satisfy *Flast*'s standing requirements); *Flast*, 392 U.S. at 102 (challenge must be to appropriation or disbursement of tax funds by Congress pursuant to the taxing and spending clause of Art. I, § 8).

In *Hein*, this Court held that taxpayers lacked standing to maintain an Establishment Clause challenge to the Executive Branch's expenditure of taxpayer funds on religious speeches and conferences. *Hein*, 551 U.S. at 605. The funds at issue were general appropriations that the Executive Branch spent within its broad discretion. *Id.* The plurality held that *Flast*'s requirement of a "'logical nexus' between taxpayer status 'and the type of legislative enactment attacked'" was lacking because "the expenditures that [plaintiffs] challenge[d] were not expressly authorized or mandated by any specific constitutional enactment." *Id.* at 608-09.

If the requisite injury was missing in *Hein*, then it is certainly missing here. In *Hein*, standing was rejected even though the plaintiffs challenged appropriations of tax money, albeit general ones. Here, by contrast, the tuition tax credit involves no appropriation of tax money at all. Further, Taxpayer-Plaintiffs' standing argument fails at an even more fundamental level because the monies STOs use in disbursing scholarships derive from thousands of private choices of individual taxpayers to voluntarily contribute money to STOs. If the taxpayers in *Hein* lacked standing to challenge the Executive Branch's use of general appropriations (in which the taxpayer's tax payments were commingled) to support religious activities, then the Taxpayer-Plaintiffs here plainly lack standing to challenge thousands of private person's (rather than the government's) decisions on how to use their own (rather than the Taxpayer-Plaintiffs') money.[10]

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[10] This discussion highlights the Ninth Circuit's error in relying on *Bowen v. Kendrick*, 487 U.S. 589 (1988) to find that the Taxpayer-Plaintiffs have standing. ACSTO Pet. App. 14a-15a. In *Bowen*, the taxpayers had standing because the statute under attack "expressly authorized and appropriated specific funds for grant-making," and "expressly contemplated that some of those moneys might go to projects involving religious groups." *Hein*, 551 U.S. at 607. Here, the tax credit statute does not appropriate any funds at all. Further, *Bowen* involved the allegedly unlawful expenditure of federal monies *which included the taxpayer-plaintiffs' funds*. Thus, the *Bowen* plaintiffs established a necessary and predicate harm underlying claims of taxpayer "injury" in the Establishment Clause context. *See* § I.A.1., *supra*. Here, unlike in *Bowen*, Taxpayer-Plaintiffs do not claim that their tax dollars are being extracted and spent.

Doremus too is illustrative. There, the Court denied taxpayer standing because the plaintiffs' complaint contained "no allegation that [the mandated Bible reading] is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." *Doremus*, 342 U.S. at 433. The Court distinguished the "justiciable controversy in *Everson v. Board of Education*, 330 U.S. 1 [(1947)]," because the plaintiff there "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not." *Id.* at 434.

The same is true of Taxpayer-Plaintiffs' complaint. Nowhere does it allege that the State has appropriated or disbursed any sum of tax dollars to fund the tuition tax credit program. In its review of the identical program, the Arizona Supreme Court unequivocally held that "this tax credit is not an appropriation of public money," and that "no tax has been laid here." *Kotterman*, 972 P.2d at 621. *See also Cuno*, 547 U.S. at 347 (questioning whether a state tax credit "is analogous to an exercise of congressional power under Article I, § 8"). These holes sunk plaintiff's theory of taxpayer standing in *Doremus*, and they likewise sink Taxpayer-Plaintiffs' theory of standing here.

4. Decisions By Thousands Of Taxpayers To Donate Their Money And Take The Credit Is Not An "Appropriation" Of Money.

In an attempt to squeeze their case within *Flast*'s narrow exception, Taxpayer-Plaintiffs speculate in their complaint that the tax credit reduces State revenues, and that this "reduction" is the equivalent of an appropriation of tax monies. ACSTO Pet. App. 119a. In addition to the conjectural nature of this "injury," *see* § I.A.5., *infra*, there are at least three other problems with it. First, speculating that State revenues are reduced because third parties take tax credits for voluntary contributions to nonprofit organizations simply does not implicate Taxpayer-Plaintiffs' tax payments. Thus, they cannot even allege a necessary predicate harm underlying taxpayer "injuries," let alone satisfy the other prerequisites of Article III standing.

Second, the Arizona Supreme Court rightly rejected the argument that the alleged "reduction" of state revenues that occurs as a result of the tax credit "has the same effect as an appropriation." *Kotterman*, 972 P.2d at 620. Indeed, it strains credulity to say that the individual and private decisions of thousands of taxpayers to take a tax credit are the equivalent of an appropriation of money by the state legislature.

Third, *Kotterman* rightly rejected the related argument that the tax credit levies a tax:

> We cannot say that the legislature has somehow imposed a tax by declining to collect potential revenue from its citizens. Nor does this credit amount to the laying of a tax by causing an increase in the tax liability of those not taking advantage of it. . . . [I]f we were to conclude that this credit amounts to the laying of a tax, we would be hard pressed to identify the citizens on whom it is assessed.

Id. at 621.

In sum, Taxpayer-Plaintiffs are in the same position as the plaintiffs in *Doremus*. They have not alleged, nor can they, that the tax credit program "is supported by any separate tax," or "paid for from any particular appropriation." *Doremus*, 342 U.S. at 433. Thus, they simply cannot meet this Court's requirement as set out in *Doremus*, *Hein*, and *Flast*, that they challenge a specific appropriation of tax money (in which their money is commingled) that supports an allegedly unconstitutional program. They therefore lack Article III standing.

5. Taxpayer-Plaintiffs' "Reduced Revenue" Theory Of Standing Is Speculative And Thus Cannot Confer Standing.

"Prior decisions of this Court establish that unadorned speculation will not suffice to invoke the federal judicial power." *Eastern Kentucky Welfare Rights Org. v. Simon*, 426 U.S. 26, 44 (1976).

Taxpayer-Plaintiffs' theory, that they are "irreparably harmed by the diminution of the state general fund through the tax credit program," ACSTO Pet. App. 126a, is based on nothing more than "unadorned speculation," and thus fails to satisfy Article III.

a. It Is Pure Speculation That The Tax Credit Results In Decreased Revenue For The State.

This Court's decision in *Cuno*, *supra*, demonstrates the speculative nature of Taxpayer-Plaintiffs' "reduced" revenue theory of standing. In *Cuno*, the taxpayer-plaintiffs challenged a state tax credit provided to the DaimlerChrysler corporation to induce it to expand a manufacturing plant within the State. 547 U.S. at 337. The injury claimed by the taxpayers in *Cuno* is indistinguishable from the injury claimed here. They claimed that the tax credit "'depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments' and thus 'diminish[es] the total funds available for lawful uses . . . .'" *Id.* at 343 (citation omitted).

Cuno rejected the plaintiffs' reduced revenue injury because it was pure speculation how the tax credit would impact the state treasury. As this Court observed, "[I]t is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues." *Id.* at 344.

Similarly, the economic impact of the tuition tax credit on Arizona's revenues is too speculative to support Article III standing. As this Court has observed, state programs aimed at expanding educational choice by making private schools more affordable likely *decrease* a state's tax burden: "By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers." *Mueller*, 463 U.S. at 395.

There are myriad tax savings implicated by the tuition tax credit program. For starters, the State expends approximately $9,500 per pupil at its public schools. Cato Pet. Br. 15. In addition to this savings on expenditures, there are also additional savings for each student who switches from public to private school as a result of the program. For instance, a study Taxpayer-Plaintiffs rely on to claim the credit has reduced State revenues explains that the tax credit likely decreases the State's costs in hiring new teachers, building new school buildings, and buying additional equipment because fewer students are attending public schools. JA 55. The same study also highlights a 2002 National Education Association study on school modernization that found that "Arizona faces an estimated $5.7 billion cost for school modernization, including $4.7 billion for infrastructure and $921 million for technology needs." *Id.* The study concludes that Arizona will likely be relieved of some of this $5.7 billion public

school modernization expense because of the tax credit.[11] *Id.*

In addition to reducing the state's tax burden in the many ways noted above, the tuition tax credit also likely increases the sources of state tax revenues in many ways. These include, *inter alia*: 1) an increase in the number of teaching, administrative, and management positions at already existing private schools; 2) the expansion of already existing private schools to accommodate additional students generated by the program; and 3) the establishment of new private schools in the State.

In finding that the Taxpayer-Plaintiffs had standing based on their novel "reduced revenue" theory of standing, the Ninth Circuit committed the same error as the *Cuno* plaintiffs: it looked at only one side of the ledger. The Ninth Circuit relied on Taxpayer-Plaintiffs' allegations that taxpayers had increased their giving under the program from $1.8 million in its first year of operation (1998) to $54 million in 2007. ACSTO Pet. App. 11a-12a n.7. But as *Cuno* stresses, Taxpayer-Plaintiffs' "reduced revenue" theory cannot be evaluated by myopically

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[11] In concluding that the tax credit led to a reduction in state revenues, the study writers did not account for the additional tax savings in being relieved of even a small portion of the substantial modernization costs faced by the State. JA 55. The study also did not account for the many additional cost savings resulting from the tax credit, nor for the many increases in sources of state revenues, but erroneously relied only on the public education per pupil cost in calculating the financial impact of the tax credit. *Id.* at 54-55.

focusing on the credits taken. The tax savings and new sources of tax revenue mentioned above count as well.

Highlighting the purely speculative nature of Taxpayer-Plaintiffs' alleged injury are numerous studies that have come to different conclusions regarding the short-term tax revenue impact of the tuition tax credit.[12] A 2001 Cato Institute study found that "although Arizona lost $13.7 million in 1999, we find that, once savings are taken into account, the credit was revenue neutral" and that over time "[t]he cost of the credit is likely to be significantly less than the savings that result from student transfers." Carrie Lips and Jennifer Jacoby, *The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money*, Cato Institute Policy Analysis No. 414, Sept. 17, 2001, at 1, www.cato.org/pubs/pas/pa414.pdf. The study Taxpayer-Plaintiffs rely on found that the State likely lost revenue in the short term, but that "it is probable that future savings will fully offset the revenue loss, eventually saving taxpayers money." JA 28. A more recent study concludes that in 2008 the tax credit "save[d] Arizona taxpayers somewhere from $99.8 to $241.5 million due to students enrolling in private rather than public schools," while taxpayers claimed only $55.3 million in credits. Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, at 1, archive.constantcontact.com/fs035/1011

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[12] Regardless of the alleged short-term claims, each study highlighted herein agrees on the long-term savings of the tax credit.

04793261 6/archive/1102832763902.html. These studies' varying calculations regarding the short term financial impact demonstrate that Taxpayer-Plaintiffs' alleged injury is highly subjective, and depends largely on how one analyzes the available financial data.[13] The concrete injury required by Article III simply cannot be grounded on rampant speculation. Nor can it be satisfied by Taxpayer-Plaintiffs' cherry-picking facts within a study that, upon closer examination, does not even support their "reduced revenue" theory.

b. It Is Pure Speculation That Taxpayer-Plaintiffs' Tax Burden Has Increased As A Result Of The Tuition Tax Credit.

Cuno also rejected as too speculative the claimed injury that the plaintiffs "local and state tax burdens were increased" as a result of the "reduction" in state revenues occasioned by the tax credit at issue there. 547 U.S. at 338. *Cuno*'s rejection of this theory of injury is directly applicable here, as Taxpayer-Plaintiffs claim that they and other taxpayers bear

[13] In *Mueller*, this Court declined to let fluctuating statistical information control the constitutionality of neutral programs of private choice. 463 U.S. at 401. The same rationale applies to the question of standing. Indeed, the uncertainty that inheres in such an approach to evaluating Establishment Clause claims, *see id.* ("we [cannot] perceive principled standards by which such statistical evidence might be evaluated"), plainly also undermines claims of standing. Such an approach would lead to the absurd result that a plaintiff could have standing some of the time, but not all the time, to challenge the same program, depending on what a snapshot of the statistics show.

the burden of the alleged "reduction" in Arizona's revenues. Appellants' Resp. to Pets. for Reh'g En Banc 3, 9th Cir. Case No. 05-15754, Dkt. No. 87 (claiming that the reduction of state revenue occasioned by the tax credit is "borne entirely by the State treasury and thus by other taxpayers").

As *Cuno* explains, such an injury is conjectural because it depends "on how legislators respond to a reduction in revenue, if that is the consequence of the credit." 547 U.S. at 344. Under such circumstances, "[e]stablishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit." *Id.* *Cuno* concluded that this is precisely the "sort of speculation" that does not "suffice[] to support standing." *Id.*

This Court has rejected similar "injuries" in other cases. In *ASARCO*, taxpayers challenged an Arizona statute that permitted school trust lands (which were granted to the state by the federal government for the purpose of funding public education) to be leased for less than the appraised value, allegedly contravening federal law and the Arizona Constitution. 490 U.S. at 614. The plaintiffs claimed that the statute reduced the state funds available for public education, resulting in higher taxes for them. *Id.* This Court found that the plaintiffs had not suffered a cognizable injury because, even if it were true that the state's acts had depleted the trust fund, "it is pure speculation whether the lawsuit would result in any actual tax relief for respondents." *Id.*

The Arizona Supreme Court's ruling in *Kotterman* also highlight the speculative nature of Taxpayer-Plaintiffs' injuries. First, regarding their notion that the credit increases taxes of third parties, the court found that the credit does not "amount to the laying of a tax by causing an increase in the tax liability of those not taking advantage of it." 972 P.2d at 621. In addition, the court noted the speculation in this theory: "[I]f we were to conclude that this credit amounts to the laying of a tax, we would be hard pressed to identify the citizens on whom it is assessed." *Id.* Speculation is the *sine qua non* of Taxpayer-Plaintiffs' claimed injury.

6. Taxpayer-Plaintiffs Are Seeking An Unprecedented Rule That Would Give Taxpayers Alleging Establishment Clause Violations A Free Pass On Proving An Article III Injury.

Taxpayer-Plaintiffs claim the glaring holes in their standing theory outlined above are irrelevant because *Flast* gives them standing "by virtue of their taxpayer status alone." *See* Appellants' Supp. Br. 5, *supra*. In addition to being a gross overstatement of *Flast*'s narrow exception to the bar on taxpayer suits, it also flies in the face of this Court's precedent both before and since *Flast*, ranging from *Frothingham* to *Hein*. *See supra*.

Importantly, *Valley Forge* rejects the notion on which Taxpayer-Plaintiffs' claimed injury is predicated, i.e., that "enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege 'distinct

and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted.'" 454 U.S. at 488 (citation omitted). This Court said that the "norm of conduct" set by the Establishment Clause is no more or less "fundamental" than those set by other constitutional provisions. *Id.* at 484. Accordingly, the Court refused a "sliding scale" rule of standing "under which the Art. III burdens diminish as the 'importance' of the claim on the merits increases." *Id.* This is precisely the rule Taxpayer-Plaintiffs seek here.

This is illustrated perfectly by Taxpayer-Plaintiffs' insistence that they have standing even though the precise injury they claim—"reduced" state revenue resulting from a tax credit—has been rejected by this Court as speculative. *See supra*. Their position is that while all other taxpayer-plaintiffs must prove a concrete injury, simply because they are alleging Establishment Clause violations they get a free pass. Such an approach directly conflicts with nearly a century of this Court's precedent, is expressly rejected by *Valley Forge*, and would result in an unwarranted expansion of Article III standing into the realm of speculative injuries (of course, only for Establishment Clause plaintiffs). Taxpayer-Plaintiffs' desire for a free pass on Article III's injury requirement must be rejected.

B. The Taxpayer-Plaintiffs Cannot Establish That Their "Injury" Is Fairly Traceable To The State's Allegedly Unlawful Conduct.

In addition to failing Article III's injury requirement, their standing theory also fails the second prong of the standing test: that "there must be a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. Considering the lack of a cognizable injury here, *see supra*, the answer to the question of whether such a "causal connection" exists must be "No."

Taxpayer-Plaintiffs' primary injury—the alleged "reduction" of State revenues—fails the causation prong because, as discussed *supra*, there is simply no way for Taxpayer-Plaintiffs to establish that State revenues have *actually* decreased. Here, as with many other tax-saving mechanisms (credits, exemptions, deductions, etc.), the net effect of the tuition tax credit is likely an increase, not a decrease, in revenues. *Cuno*, 547 U.S. at 344.

Similarly, Taxpayer-Plaintiffs also cannot establish causation in relation to the only personal (yet wildly speculative, *see supra*) pecuniary injury they could conceivably claim: that their tax burden has increased as a result of the tax credit. As this Court explained in *Cuno*, proving causation under such circumstances requires the federal courts to presume that state lawmakers will react to a "reduction" in revenue by increasing its citizens' tax burdens. 547 U.S. at 344. But "[f]ederal courts may not assume a particular exercise of . . . state fiscal

discretion in establishing standing; a party seeking federal jurisdiction cannot rely on such '[s]peculative inferences . . . to connect [his] injury to the challenged actions of [the defendant].'" *Id.* at 346 (citation omitted).

Causation is also lacking because the actions Taxpayer-Plaintiffs complain of are taken by independent third party taxpayers, not the government. As this Court explained in *Lujan*, Article III poses an even higher hurdle when "[t]he existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" 504 U.S. at 562 (citation omitted). Here, thousands of unfettered choices by individual taxpayers to donate money to 501(c)(3) organizations and take the credit break the chain of causation between injury and government action.

C. The Taxpayer-Plaintiffs Cannot Establish That Their "Injury" Will Likely Be Redressed By A Favorable Decision.

As with the injury and causation prongs of the Article III standing test, Taxpayer-Plaintiffs also fail the redressability prong. Under this prong, the plaintiff must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted).

Taxpayer-Plaintiffs ability to establish the redressability prong of Article III standing hinges entirely on whether they can prove that their two claimed injuries—a "reduction" in revenues that in turn increases their tax burden——can be redressed by a favorable decision.[14] As to the speculative "reduced revenue" injury, Taxpayer-Plaintiffs simply cannot establish that a favorable decision will provide them redress. As the discussion *supra* demonstrates, enjoining the tax credit is just as (if not more) likely to decrease the State's revenues, as to increase them.

And as to any claim that the tax credit has increased their tax burden, *Cuno* answers why such an injury is not redressable. There, the taxpayer-plaintiffs theorized that enjoining the objectionable tax credit would benefit them because state legislators would react to the alleged tax savings by reducing their tax burden. 547 U.S. at 344. Redress was lacking under such circumstances because "establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions." *Id.* Such speculation, this Court concluded, does not "suffice[] to support standing." *Id.* *ASARCO* is to the same effect. 490 U.S. at 614

[14] Because Taxpayer-Plaintiffs do not (and cannot) claim that "three pence" of *their* money is being spent in support of religion under the tax credit program, an "injunction against the spending," *Cuno*, 547 U.S. at 347-48, will not "personally [] benefit [them] in a tangible way," *Valley Forge*, 454 U.S. at 480 n.17.

(claim that reduced revenues resulted in higher tax burden rejected because "it is pure speculation whether the lawsuit would result in any actual tax relief for respondents" and thus the "claimed injury is not 'likely to be redressed by a favorable decision'"). Plainly, any claim by the Taxpayer-Plaintiffs here that the tuition tax credit increases their individual tax burden is foreclosed by *Cuno* and *ASARCO*.

D. Article III's Purpose Of Preserving Federalism And Separation Of Powers Is Respected By Denying Standing To Taxpayer-Plaintiffs.

Article III and its standing requirements, as noted *supra*, serve an important role in preserving federalism and the separation of powers.[15] As this Court said in *Valley Forge*, Article III serves the purpose of "limit[ing] the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" 454 U.S. at 472 (quoting *Flast*, 392 U.S. at 97). These important considerations provide further support for denying Taxpayer-Plaintiffs' standing here.

Importantly, in both *Cuno* and *ASARCO*, this Court explained that a taxpayer who insists that the

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[15] Of course, this case most strongly implicates Article III's federalism concerns, since it involves the federal judiciary's review of a State legislative enactment, and even more, because that enactment involves state budgetary matters.

government dispose of any revenue it may receive as a result of his lawsuit in a manner that benefits him runs headlong into important federalism and separation of powers considerations. "[T]he decision of how to allocate any such savings is the very epitome of a policy judgment committed to the 'broad and legitimate discretion' of lawmakers, which 'the courts cannot presume either to control or to predict.'" *Cuno*, 547 U.S. at 345 (quoting *ASARCO*, 490 U.S. at 615); *see also ASARCO*, 490 U.S. at 614-615 (courts are "unable to evaluate with any assurance the 'likelihood' that decisions will be made a certain way by policymaking officials").

What Taxpayer-Plaintiffs propose is an unwarranted interjecting of taxpayers, and concomitantly the federal courts, into state budgetary decisions, an area typically left to the broad and legitimate discretion of state officials. This Court admonished against such an approach in *Cuno*:

> [B]ecause state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as "'virtually continuing monitors of the wisdom and soundness'" of state fiscal administration, contrary to the more

> modest role Article III envisions for federal courts.

547 U.S. at 346 (citation omitted).

This Court "has refused to establish a constitutional rule that would require or allow 'permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.'" *Hein*, 551 U.S. at 617 (Kennedy, J., concurring) (citation omitted). The instant case provides no occasion to contravene this rule.

E. The Arizona Supreme Court's Decision That The Funds Generated By The Tax Credit Are Private, Not Public, Funds Supports The Denial Of Standing To Taxpayer-Plaintiffs.

Article III's role in preserving federalism and the separation of powers is particularly relevant to the instant challenge because in *Kotterman* the Arizona Supreme Court authoritatively interpreted the tax credit statute involved here. It is well settled that the Arizona high court's interpretation of the state's tax laws are binding on the federal courts. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law" and federal courts are therefore "bound by their constructions except in extreme circumstances").

Kotterman has particular importance here because its holding that the funds generated by the

tax credit are private, not public, monies, 972 P.2d at 618, directly impacts the question of Taxpayer-Plaintiffs' Article III standing. Indeed, this case presents the epitome of a "federal constitutional issue[] [that is] likely to turn on questions of state tax law," *California v. Grace Brethren Church*, 457 U.S. 393, 410 (1982), and here the answer to the critical state law question—the nature of tax credit funds—is supplied by *Kotterman*.

The Arizona Supreme Court unequivocally held that the funds STOs use in dispensing tuition scholarships are private money:

> [N]o money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

Kotterman, 972 P.2d at 618. This holding demonstrates that no matter what "injury" Taxpayer-Plaintiffs assert, that "injury" does not involve state money and thus cannot confer Article III standing.[16]

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[16] The fact that the *Kotterman* court reached the merits of whether the tuition tax credit violated the federal Establishment Clause is of no moment as it relates to Article III standing. It is well-settled that "Article III do[es] not apply to state courts," and that therefore "the state courts are not bound by the limitations of a case or controversy or other

The Ninth Circuit erred by not following *Kotterman*'s authoritative interpretation of state law in deciding the Article III standing issue. Rather than denying standing because the tax credit involves purely private monies, the court instead supplanted *Kotterman*'s interpretation of Arizona law with its view that the tax credit "'channel[s] . . . [state] assistance' to private organizations," and accordingly held that Taxpayer-Plaintiffs had Article III standing. ACSTO Pet. App. 12a.

In addition to the direct conflict between *Kotterman* and the Ninth Circuit's holdings regarding the nature of tax credit funds, *Kotterman* also rejects each of the premises upon which the Ninth Circuit's holding rests. For example, the Ninth Circuit found that credits taken are public money because they are deducted after tax liability has been calculated. ACSTO Pet. App. 11a. *Kotterman* rejected this:

> For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before. . . . We believe that such a conclusion is both artificial and premature. It is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed

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federal rules of justiciability even when they address issues of federal law." *ASARCO*, 490 U.S. at 617.

> to the government, and upon which the state has a legal claim.

972 P.2d at 618.

The Ninth Circuit also found that the tax credit involves state money because "the state legislature has provided only two ways for this money to be spent: taxpayers will either give the dollar to the state, or that dollar . . . *will* end up in scholarships for private school tuition." ACSTO Pet. App. 14a. *Kotterman* rejected this:

> Petitioners suggest . . . that because taxpayer money *could* enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts quasi-ownership over it. This expansive interpretation is fraught with problems. Indeed, under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature.

972 P.2d at 618.

Finally, the Ninth Circuit's view that the tax credit operates "as if the state had given each taxpayer a $500 dollar check that can only be endorsed over to a STO or returned to the state," ACSTO Pet. App. 13a, is rejected by *Kotterman*'s holding that "reducing a taxpayer's liability is [not] the equivalent of [the state] spending a certain sum of money," 972 P.2d at 620. *Accord Walz*, 397 U.S. at

667, 675 (rejecting plaintiff's claim that "grant of an exemption to church property indirectly requires [him] to make a contribution to religious bodies" and instead holding that the tax exemption "is not sponsorship since the government does not transfer part of its revenue to churches").

The Ninth Circuit's rationale regarding why *Kotterman*'s private funds holding is irrelevant to the Article III standing analysis is unavailing. In a short footnote, the court states that *Kotterman* involved only the narrow question of whether the tax credit "constitute[s] an 'appropriation of public money' within the meaning of" Arizona's Religion Clauses, and thus "has no bearing on our analysis of plaintiffs' standing in federal court." ACSTO Pet. App. 12a n.8. But *Kotterman* is scarcely so limited. First, it expressly ruled that the tax credit does not violate the federal Establishment Clause. *See Kotterman*, 972 P.2d at 611-16. Second, its private funds holding applies even beyond the context of the religion clauses. *See id.* at 617 (basing its private funds holding on cases dealing with state employee retirement benefits, payments by university regents, and contracts between state agencies and tribal government). Further, *Kotterman* adopted the view that tax credits are not public money based on the rationale that "funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government." *Id.* at 618.

The question of the nature of the tax credit funds is one of state tax law, the interpretation of which

falls ultimately within the province of the Arizona Supreme Court. And in *Kotterman*, Arizona's high court held that those funds are private. The "state court[] [is] due more respect than" the Ninth Circuit gives it. *Hibbs*, 542 U.S. at 113 (Kennedy, J., dissenting). Indeed, as shown *supra*, this Court's precedent, and Article III's vital role in preserving the separation of powers and federalism, demand it.

II. The Taxpayer-Plaintiffs' Complaint Fails To State A Claim Under The Establishment Clause.

In addition to erring in holding that the Taxpayer-Plaintiffs have Article III standing, the Ninth Circuit also erred in finding that their complaint sufficiently pled an Establishment Clause violation.[17]

The Establishment Clause "prevents a state from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 648-49 (citation omitted). As discussed below, the tax credit challenged here easily satisfies this test because it is a neutral program based on multiple levels of private choices.

As the Ninth Circuit noted, Taxpayer-Plaintiffs readily admit this. "Plaintiffs do not contest that [the

[17] The Ninth Circuit further erred by applying the "no set of facts" motion to dismiss standard set out in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *see* ACSTO Pet. App. 9a, which this Court recently abrogated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

tax credit] is neutral with respect to the taxpayers who direct money to STOs, or that any of the program's aid that reaches a STO does so only as a result of the genuine and independent choice of an Arizona taxpayer." ACSTO Pet. App. 32a.

What Taxpayer-Plaintiffs propose, then, is to turn the Establishment Clause on its head. While that Clause permits governments to devise programs that operate on the principle of private choice so that the "circuit between government and religion [is] broken," *Zelman*, 536 U.S. at 652—which Arizona has plainly done here—Taxpayer-Plaintiffs would hold Arizona liable for an Establishment Clause violation based on these very same private choices. They conceded this at oral argument before the Ninth Circuit:

> JUDGE NELSON: But isn't this really a neutral program with multiple layers of private choice ultimately?
> MR. BENDER: Definitely.
> JUDGE NELSON: All right.
> MR. BENDER: And it's those multiple layers that make it unconstitutional.

ACSTO App. 5a.

Taxpayer-Plaintiffs thus seek to bind Arizona in the ultimate catch-22. Under their proposed rule, to comply with the Establishment Clause is to violate it. The Ninth Circuit's acceptance of Taxpayer-Plaintiffs tortured view of the Establishment Clause should be rejected.

Another critical point must be highlighted at the outset. In *Kotterman*, the Arizona Supreme Court held that the tax credit satisfies *Lemon*'s purpose and effect prongs. *See Kotterman*, 972 P.2d at 610-16. Taxpayer-Plaintiffs try to avoid these holdings by "abandoning" their facial challenge and pursuing only an "as-applied" challenge. Opp. 15 ("The present case . . . is an *as-applied* challenge, not to the statute's text, but to the program as it actually operates").[18] But the program as it operates is no different from what it contemplates facially.

Taxpayer-Plaintiffs' theory is that the *Kotterman* court was unaware that the tax credit statute, in operation, would allow STOs to limit scholarships to select schools, so its facial constitutionality holding is irrelevant. The problem with this theory is that the tax credit statute allows STOs to restrict scholarships *on its face*, stating that an STO must "provide educational scholarships or tuition grants to students without limiting availability to only students of one school." A.R.S. § 43-1089(G)(3), ACSTO Pet. App. 115a. Obviously, an STO could give scholarships to just two schools and satisfy the statute. The *Kotterman* majority and dissent were fully aware of this fact. 972 P.2d at 614 (under the tax credit statute STOs "may not limit grants to students of only one [qualified school]"); *id.* at 630 (the statute does not "prevent an STO from directing all of its grant money to schools that restrict enrollment or education to adherents of a particular

[18] Counsel for Taxpayer-Plaintiffs twice stated at oral argument before the Ninth Circuit that they abandoned their facial challenge. ACSTO App. 6a-7a.

religion or sect") (Feldman, J., dissenting). Even Taxpayer-Plaintiffs' complaint alleges that the tax credit statute, on its face, allows two schools to create an STO to serve just those schools. ACSTO Pet. App. 125a.

Thus, Taxpayer-Plaintiffs' "as-applied" argument is no different from its abandoned facial claim. Indeed, the "as applied" facts Taxpayer-Plaintiffs allege that they need an opportunity to prove are admitted by the parties, and are the same as those contemplated on the face of the statute and in their complaint. Thus, *Kotterman*'s holding that the tax credit satisfies the *Lemon* test cannot be so easily dismissed. The Ninth Circuit erred in finding that Taxpayer-Plaintiffs' recasting of their facial challenge as an as-applied challenge excused its ignoring of *Kotterman*. ACSTO Pet. App. 7a n.3.

A. The Tuition Tax Credit Serves A Valid Secular Purpose.

A government's asserted secular purpose for enacting a law "will generally get deference." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). No less than three courts—the Arizona Supreme Court, the district court below, and even the Ninth Circuit—have determined that the tax credit statute serves a secular purpose.

The Arizona Supreme Court found the secular purpose prong satisfied because the tuition tax credit was part of the state's broader goal to expand "the mix of educational alternatives open to the people of

this state." *Kotterman*, 972 P.2d at 611. The court noted that contemporaneous with expanding access to private schools through the tax credit, the state had also enacted statutes requiring public schools to offer open enrollment without charging tuition and establishing charter schools. *Id.* The district court likewise found that the tax credit statute "on its face does not mention religion but is instead part of a secular state policy to maximize parents' choices as to where they send their children to school." ACSTO Pet. App. 50a.

Consistent with these two courts, the Ninth Circuit held that "[t]he legislative history of Section 1089 shows that its primary sponsor's concern in introducing the bill was providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." ACSTO Pet. App. 18a. The panel should have stopped its inquiry into *Lemon*'s purpose prong with this finding, as this Court has held an indistinguishable purpose sufficient to satisfy that prong. *See Mueller*, 463 U.S. at 395 ("A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable"). Its failure to do so was caused by at least two errors, which are discussed below.

1. *McCreary* Does Not Support The Lack Of Deference The Ninth Circuit Gave To Arizona's Claimed Secular Purpose.

The Ninth Circuit noted the rule that a government's asserted secular purpose should receive judicial deference, and then provided none. ACSTO Pet. App. 19a. This lack of deference was not warranted. As *McCreary County* explains, the deference rule is only suspended in those highly "*unusual cases* where the claim [is] an apparent sham." 545 U.S. at 865 (emphasis added). Such "unusual cases" (which consists of only four cases since *Lemon* was decided), involve circumstances in which it was "a commonsense conclusion that a religious objective permeated the government's action." *Id.* at 863.

This is plainly not such a case. Taxpayer-Plaintiffs concede this in their complaint by failing to allege that the tax credit serves any religious purpose (let alone one that is "ostensible and predominant," *id.* at 860), or that the State's asserted secular purpose is a sham. This failure ends the purpose prong analysis in the motion to dismiss context.

2. The Purpose Prong Is Analyzed Based On The Actions Of The Government, Not Of Private Third Parties.

The Ninth Circuit found that Taxpayer-Plaintiffs could prove that the legislature's secular purpose is a sham because the tax credit, in practice, allows

taxpayers to donate money to STOs that support only religious schools. ACSTO Pet. App. 19a. But the problem for the Ninth Circuit is that the tax credit is *implemented by private parties*, and it is axiomatic that only government action may violate the Establishment Clause.

This case involves a clear line between government and private action. The State's involvement ends with the enactment of the statute authorizing tax credits for donations to 501(c)(3) organizations that dispense scholarships. ACSTO Pet. App. 86a (O'Scannlain, J., dissenting from denial of rehearing en banc). From there, private parties—taxpayers, the 501(c)(3) STOs, and parents—take over. *Id.* Any "concentration" of funds in religiously-affiliated STOs,[19] and the decisions of STOs to support religious schools, nonreligious schools,[20] or both, are products of private choice. As the Ninth Circuit rightly said of STOs, they are not "state actors" and thus their "conduct, in itself, [cannot] support an Establishment Clause Claim." ACSTO Pet. App. 21a n.10. The same is true of taxpayers.

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[19] As noted *infra*, the alleged "concentration" of funds in religiously-affiliated STOs has dropped from the claimed amount of 94% in 1998 to 67% in 2009. *See* § II.B.3. This is a far cry from the 96% of voucher funds flowing to religious schools in *Zelman*, which this Court found irrelevant to the constitutionality of the program. 536 U.S. at 658.

[20] The Ninth Circuit narrowly focuses on religiously-affiliated STOs, but as noted in the Statement of Facts, *supra*, at least 8 STOs grant scholarships to students attending only private, nonreligious schools, and there are many more that serve both religious and nonreligious schools.

Nonetheless, what the Ninth Circuit proposes is a rule that would find a law invalid under the purpose prong so long as the plaintiff can prove that the government knew (or even had an inkling) that private parties would utilize a neutrally available benefit program to advance their personal religious aims. ACSTO Pet. App. 80a (invalid purpose could be found based on evidence "concerning what the legislature *actually* knew about how the [tax credit statute] would likely operate"). If that were the law, this Court would have to overrule *Walz v. Tax Commission*, 397 U.S. 664 (1970), since the tax exemption challenged there provided a benefit that the government knew churches would use to advance their religious purposes. And "tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions," would likewise be imperiled. *Kotterman*, 972 P.2d at 618. Even *Zelman* and *Mueller* would have failed because the government undoubtedly could have forecast that a high concentration of the benefits made available in those cases would flow to religious schools given the "preponderance of religiously-affiliated private schools" in their respective markets. *Zelman*, 536 U.S. at 656-57. The Ninth Circuit plainly erred.

B. The Tuition Tax Credit Does Not Have The Primary Effect Of Advancing, Nor Does It Impermissibly Endorse, Religion.

Under *Zelman*, a government program satisfies *Lemon*'s effects prong if it is a "neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous

independent decisions of private individuals." 536 U.S. at 655. The tax credit is such a program. *See Kotterman*, 972 P.2d at 616 (tax credit satisfies the effects test because it "aids a 'broad spectrum of citizens,' allows a wide range of private choices, and does not have the primary effect of either advancing or inhibiting religion") (citations omitted). Thus, it fully satisfies *Zelman* and this Court's other "private choice" decisions. *Mueller*, *supra*; *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

Indeed, the tax credit bears all the hallmarks of a program that is "not readily subject to an Establishment Clause challenge." *Zobrest*, 509 U.S. at 8. Such programs must benefit a broad range of beneficiaries that are "defined without reference to religion." *Id.* Here, as the district court observed, the tax credit statute "on its face does not mention religion." ACSTO Pet. App. 50a.

Further, the beneficiaries of the tax credit are far broader than the beneficiaries this Court has previously found sufficient. The vouchers in *Zelman* were available to "any parent of a school-age child who resides in the Cleveland City School District." 536 U.S. at 653. The tax deduction for education expenses in *Mueller* was available to parents of children in public and private schools. 463 U.S. at 397. This Court held both sufficient. Here, the tax credit is open to *every* taxpayer in the state, regardless of whether they have children in school.

The last hallmark of *Zelman*-like constitutional programs is that the funds which flow to religious institutions must do so based on "numerous independent decisions of private individuals." *Zelman*, 536 U.S. at 655. This is precisely how the tax credit works. As the district court below held:

> The Tuition Tax Credit allows for the private formation of non-profit STOs to raise money for the schools of their choice. Then, taxpayers, if they elect to invoke the tax credit at all, donate to the STO of their choice. Finally, parents choose the school that they want their child to attend and apply for aid from an STO which grants scholarships to that school.

ACSTO Pet. App. 52a-53a. Moreover, these private decisions are "completely devoid of state intervention or direction." *Kotterman*, 972 P.2d at 614. Arizona's tax credit is plainly a program of private choice.

Taxpayer-Plaintiffs do not dispute any of this. They have abandoned their facial claim, and concede that the program involves multiple layers of private choice. *See supra*. Once again, what they seek is to condemn the tax credit based on the very private choices this Court has lauded as a means of compliance with the Establishment Clause.

The Ninth Circuit erred in several ways in accepting Taxpayer-Plaintiffs' novel thesis, as discussed below. But its most fundamental error was failing to recognize that "[f]or a law to have

forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original). Here, each aspect of the program the Ninth Circuit identifies as a likely violation of the Establishment Clause is a product of private choice.

1. The State Is Not Coercing Parents To Choose Religious Over Secular Education.

Whether Arizona is coercing parents into sending their children to religious schools is "answered by evaluating *all* options [Arizona] provides . . . schoolchildren." *Zelman*, 536 U.S. at 656. This Court rejected claims of coercion in *Zelman* because Cleveland children enjoyed a wide range of educational choices, including: remaining in public school; obtaining a scholarship and attending a private school (religious or nonreligious); enrolling in a community school; or enrolling in a magnet school. *Id.* at 655.

Arizona provides a similar, if not greater, array of education choices. It maintains a "multi-dimensional educational system," *Kotterman*, 972 P.2d at 616, which, as discussed in the Statement of Facts, *supra*, includes: attending a traditional public school, which under law must have open enrollment and may not charge tuition; attending any one of a broad array of charter schools, which are non-tuition charging public schools; attending a "virtual

academy," which offers an online public education; being educated at home, pursuant to a permissive homeschooling policy; and attending a private school (religious or nonreligious, perhaps with, and perhaps without, tuition aid). If there was no coercion in *Zelman*, there is certainly no coercion here.

2. The Tax Credit Does Not Limit Parents' Educational Choices.

The tax credit does not limit parental choice; it increases it. Under the tax credit: all taxpayers, regardless of their desire to support religious education, nonreligious education, or both, may take the credit; any person, group of persons, or coalition of schools may form an STO to benefit any two or more schools, regardless of whether the schools are religious, secular, or a combination of the two; and any parent can seek a scholarship to any school of their choice.

The Ninth Circuit found that the tax credit limits parental choices because taxpayers deciding to send their donations to religiously-affiliated STOs "deprive . . . parents . . . of 'genuinely independent and private choices' to direct the program aid to secular schools." ACSTO Pet. App. 22a. But in addition to these conclusions being factually untrue,[21] they are also irrelevant since taxpayers

[21] This claim that parents are hampered in being able to obtain scholarship money to pay for tuition at nonreligious private schools is not borne out by the (constitutionally irrelevant) statistics regarding the program's operation. For example, the Ninth Circuit highlighted the fact that ASCT (which distributes scholarships to students attending both religious

(like STOs and parents) are private actors whose conduct does not violate the Establishment Clause.

The Ninth Circuit wrongly relied on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), to transmute the private actions of taxpayers into government conduct. ACSTO Pet. App. 37a-38a. *Larkin* involved a state statute that granted churches governmental veto authority over "whether a particular applicant will be granted a liquor license." 459 U.S. at 125. But STOs do not veto anyone's choices; they facilitate them. Moreover, allowing every taxpayer to claim a credit for donations to 501(c)(3) organizations is not at all comparable to the "fusion of governmental and religious functions" struck down in *Larkin*. *Id.* at 126. If providing tax benefits to individuals who make donations to religious organizations fuses

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and nonreligious schools) had a 700 student waiting list in 2004 to support this claim. ACSTO Pet. App. 31a n.15. What the Court failed to take account of is that ASCT provided scholarships to students attending 125 private schools in 2004, *and that 123 of these schools were religiously affiliated*. ASCT's Br. 4, 9th Cir. Case No. 05-15754, Dkt. No. 18. This fact leads to the corollary conclusion that 98% of these students were waiting to attend a religious school of their parents' choice. The Ninth Circuit's assumption that those on the wait list were unable to obtain a scholarship for a secular private school is entirely unwarranted. In addition, it is noteworthy that in 2008 100 of the 373 private schools that received scholarship funds from STOs were not obviously religiously-affiliated. ASCT Pet. App. 209, 227-34. And in 2009, five of the top ten STOs in terms of donations received were not religiously-affiliated. State App. 30-31. Taxpayer Plaintiffs' claims that the tax credit limits parental freedom to access nonreligious private schools are made up out of whole cloth.

government and religion in the same impermissible way that the state and church was fused in *Larkin*, then the long-standing practice of providing tax benefits to religious organizations and to those who make donations to them is unconstitutional. Indeed, the Ninth Circuit's approach would require this Court to overrule *Walz*.

Further, the Ninth Circuit's pitting of taxpayers against parents makes no sense because taxpayers and parents are often *the same people*: many taxpayers are parents and (presumably) all parents are taxpayers. And as the district court rightly held, "nothing prevents taxpayers from increasing their contributions to existing STOs which provide scholarships to secular private schools or from forming new STOs themselves for that same purpose." ACSTO Pet. App. 55a.

While there is no limiting of parental choice here, it is important to note that this Court upheld the voucher program in *Zelman* despite "limits" on parental choice. There, the program allowed all private schools located within the failing school district to participate, along with public schools in adjacent districts. 536 U.S. at 645. In practice, 46 of 56 participating private schools were religiously-affiliated, and no public schools participated. *Id.* at 656. In operation, 96% of students participating in the program attended religious schools. *Id.* at 658. The dissent argued that the concentration of students in religious schools resulted from a lack of genuine choice. *Id.* at 707 ("There is . . . no way to interpret the 96.6% of current voucher money going

to religious schools as reflecting a free and genuine choice by the families that apply for vouchers") (Souter, J., dissenting). Despite the "limits" on parental choice in *Zelman*, this Court upheld the voucher program. No "limits" exist here, let alone those identified by the dissent in *Zelman*. And here, parents have more freedom to use Arizona's program in support of secular education than the parents in *Zelman*. The Ninth Circuit erred in finding the tax credit limits parental choice.

3. The Tax Credit Does Not Create Financial Incentives Skewed In Favor Of Religious Schools.

The tax credit does not create any "financial incentive[s] that 'skew[s]' the program toward religious schools." *Zelman*, 536 U.S. at 653-54 (citation omitted). The Ninth Circuit's holding to the contrary is based on its finding that "[t]he vast majority of the scholarship money under the program—over 85 percent as of the time of plaintiffs' complaint—is available only for use at religious schools." ACSTO Pet. App. 30a. This is clear error for several reasons. First, the alleged concentration of funds in religiously-affiliated STOs is driven by the private choices of taxpayers, parents, and STOs, and thus is irrelevant to the Establishment Clause question.

Second, the Ninth Circuit ignored that Arizona's "multi dimensional educational system," *Kotterman*, 972 P.2d at 616, does not favor religious schools. As the district court properly found, tuition scholarships paid by STOs typically do not cover the full cost of

private school tuition, such that parents must copay a portion of that tuition. ACSTO Pet. App. 53a. In contrast, Arizona students can attend public schools and charter schools for free. *Id.* In addition to a free public education, Arizona also provides a tax credit that *further* incentivizes parents to select public schools, by allowing them to take a credit of up to $200 for extracurricular activity expenses. A.R.S. § 43-1089.01.[22] These are greater disincentives than existed in *Zelman*. 536 U.S. at 654 (sole disincentive was that parents must copay a portion of private school tuition while their child could attend public school options free of charge). While *Zelman* held that these features were "not necessary to [the voucher program's] constitutionality," they nonetheless "dispel[led] the claim that the program 'creates . . . financial incentive[s] for parents to choose a sectarian school.'" *Id.* (citation omitted). The same is true here.

Third, the Ninth Circuit's reliance on statistics regarding how the program is used runs headlong

[22] Notably, the public school tuition tax credit is claimed by far more taxpayers than the private school tax credit. For example, in 2009, over 239,000 taxpayers claimed the public school credit, *see* 2009 Public School Report, at 1, www.azdor.gov/Portals/0/Reports/2009PublicSchoolContribution.pdf, compared to just over 73,000 taxpayers who claimed the private school credit, State App. 18. Further, while the public school credit sets a lower cap ($200) than the private school credit ($500 single, $1,000 married), the amount of total dollars claimed under that credit has largely kept pace with the private school credit. In 2009, taxpayers claimed approximately $42 million under the public school credit, *see* 2009 Public School Report, *supra*, at 1, and approximately $50 million under the private school credit, State App. 18.

into this Court's repeated admonition that such statistics are irrelevant in judging the constitutionality of a facially neutral program. *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

This admonition is once again proven true here. For example, Taxpayer Plaintiffs' complaint alleged that in 1998 94% of scholarship funds were concentrated in religiously-affiliated STOs. ACSTO Pet. App. 120a. This number has decreased steadily since then: in 2003 it was 82%, Brief of Appellants 12, 9th Cir. Case No. 05-15754, Dkt. No. 8; in 2004 it was 79%, *id.*; in 2008 it was 68%, ASCT Pet. App. 223-24; and in 2009 it dropped again to 67%, State App. 30-31. At what point will this number be acceptable to Taxpayer-Plaintiffs? When it dips below 65%? 50%? Perhaps lower? Similarly, Taxpayer-Plaintiffs' alleged that in 1998 each of the top three STOs in terms of donations received were religiously-affiliated. ACSTO Pet. App. 121a. But in 2009, five out of the top ten STOs receiving the largest number of donations had no religious affiliation. State App. 30-31.

The year-to-year, indeed day-to-day, changes in how private parties utilize the tax credit program are simply not relevant to the constitutional analysis.

4. No Religious "Discrimination" Occurs; And The Decision Regarding Which Students Attend Which Schools Takes Place Four Levels Down In The Chain Of Private Choice.

In their opposition to the petitions for certiorari, Taxpayer-Plaintiffs claim that the tuition scholarships funded by donations taken pursuant to the tax credit are disbursed in a religiously discriminatory manner. Opp. 15. This claim misses the mark for several reasons. First, to the extent Taxpayer-Plaintiffs are claiming that STOs discriminate on the basis of religion, they are wrong. There is no evidence in the record that any STO requires applicants to be of a particular religious faith as a condition to receiving a scholarship.

Second, STOs do not discriminate; they merely choose which private schools they will support. It is the school that decides who can enroll.[23]

Finally, the decision by a private religious school regarding admission occurs *at least four levels down the private choice ladder*. First, private individuals or groups decide to form an STO; second, taxpayers choose to send a donation to the STO of their choice; third, parents decide on a private school for their

[23] Even Taxpayer Plaintiffs' assumption that most religious schools discriminate on the basis of religion is wrong. *See* Vicki Murray and Ross Groen, *Survey of Arizona Private Schools: Tuition, Testing, and Curricula*, at 1, Jan. 5, 2005, at 1, www.goldwaterinstitute.org/article/1299 (83% of private religious schools in Arizona "do not require religious affiliation for admission").

child and request a scholarship from the appropriate STO; and fourth, the selected school decides whether to admit the student. As with all other aspects of the program to which Taxpayer-Plaintiffs complain, the admission decisions that occur here are far too removed from the government to be actionable under the Establishment Clause.

5. A Reasonable Observer Would Not Perceive That The Tax Credit Endorses Religion.

The endorsement test, under which a "reasonable observer" who is "deemed aware of the history and context" of the program being challenged determines whether it conveys a message of government endorsement of religion, *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001), is easily satisfied here. As this Court said in *Zelman*,

> [W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement

536 U.S. at 654-55.

Charged with the knowledge outlined above, the reasonable observer would view the tax credit as a "neutral program of private choice," and would thus

conclude that it does not endorse religion. The Ninth Circuit plainly erred in holding to the contrary. ACSTO Pet. App. 43a.

CONCLUSION

Taxpayer-Plaintiffs ignore nearly a century of taxpayer standing precedent and seek an unprecedented expansion of *Flast*'s narrow exception to the bar on taxpayer lawsuits so they may attack a tax credit program that scrupulously complies with the Establishment Clause. The Ninth Circuit plainly erred in allowing their lawsuit to move forward. This Court should reverse the Ninth Circuit's judgment, and remand with instructions to dismiss Taxpayer-Plaintiffs' complaint.

Respectfully submitted,

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July 30, 2010

APPENDIX

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The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs-Appellants,,	)	
v.	)	No. 05-15754
ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD, Defendants-Appellees	)	

TRANSCRIPTION OF ORAL ARGUMENT
January 24, 2008

Before: HONORABLE DOROTHY W. NELSON,
HONORABLE STEPHEN REINHARDT,
HONORABLE RAYMOND C. FISHER,
Circuit Judges

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* * *

[4] MR. BENDER: Thank you, Judge Reinhardt.

And may it please the Court, this case does not involve a program of private charity. If it did, we would not be here.

This case involves a State program that uses state tax revenues to achieve a State purpose of funding scholarships, subsidizing tuition payments at nonpublic schools in Arizona.

The money that is used in this program is money paid for by all the taxpayers of Arizona in the same way as all the taxpayers of Ohio paid for the program in Zelman, because it's money that is essentially taken out of the general fund.

JUDGE NELSON: But isn't this really a neutral program with multiple layers of private choice ultimately?

MR. BENDER: Definitely.

JUDGE NELSON: All right.

MR. BENDER: And it's those multiple layers that make it unconstitutional.

The State here, unlike the state in Zelman, which chose correctly to distribute the scholarships itself and did that on a nondiscriminatory basis to parents and then let the parents use the scholarships wherever they wanted to, for some reason Arizona has

* * *

[16] applies here when there isn't the same kind of educational crisis as there was in Zelman, Supreme Court hasn't decided that yet, but if you think that that's true, then it would be all right to use STOs that don't discrimmnate on the basis of religion.

JUDGE REINHARDT: Which STOs are you attacking in this suit? I assume the ones that only give to religious

MR. BENDER: Yes.

JUDGE REINHARDT: -- institutions.

MR. BENDER: Right.

JUDGE REINHARDT: Any others?

MR. BENDER: Any ones that discriminate on the basis of religion by either only giving to religious schools or by only giving to people of a certain religion. It's those STOs that we're attacking. The Arizona School Choice Trust, if we were to win this case on that ground, would be permitted to operate.

But, Judge Nelson, it's true that in theory anybody can set up an STO, but put yourself in the position of a parent. You would like your child to go to a nonsectarian school. You can't go to the Catholic STO in Phoenix, which is the largest of all STOs. You can't go to the Arizona Christian Tuition Organization because they only give you a scholarship to do that. So you go to

* * *

[49] MR. BENDER: Thank you, Judge Reinhardt.

You correctly understand our position. It is an as-applied challenge, and we do not challenge the Arizona School Choice Trust's administering this program. We only challenge the administration of it by religion-specific STOs.

The key in Zelman is it's the recipient of the aid that the government wants to distribute that has to make the choice.

JUDGE REINHARDT: So essentially although -- you -- aside from your point that that was an emergency situation and maybe that rule didn't apply, if the Zelman rule did apply, the comparable implementation of it here would be for the State to give money directly to the parents who could then choose to go to any school they want, and under Zelman that would be permissible?

MR. BENDER: Absolutely right. Yes.

JUDGE REINHARDT: But the State didn't want to give the money to the parents. It set up these intermediaries which funnel the money to the church schools.

MR. BENDER: Right.

JUDGE NELSON: But the parent can't get the money without the parent applying to the STO; isn't that correct?

* * *

[53] I hereby certify that the foregoing pages are a true and correct transcription of the Oral Argument, as preserved on CDRom, transcribed to the best of my skill and ability.

/s/
Kimberly Portik, RMR, CRR

RESPONDENT'S BRIEF

Nos. 09-987, 09-991

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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139 73

QUESTION PRESENTED

Did the court of appeals err in holding that if most taxpayers who contribute to school tuition organizations contribute to organizations that award scholarships to students attending religious schools, Arizona Revised Statute (A.R.S.) section 43-1089 (the "Scholarship Tax Credit Program") has the purpose and effect of advancing religion in violation of the Establishment Clause even though it is a neutral program of private choice on its face and the State does nothing to influence the taxpayers' or the school tuition organizations' choice?

PARTIES TO THE PROCEEDINGS

Petitioners are Defendant Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue, and the Defendant-Intervenor Arizona Christian School Tuition Organization, a tax-exempt organization that provides scholarships so that children may attend the private Christian school of their parents' choice.

The other Defendant-Intervenors (hereafter "Parents") file this brief as Respondents in Support of Petitioners. They are parents Glenn Dennard and Luis Moscoso, whose children receive scholarships from the Arizona School Choice Trust to attend private schools, and the Arizona School Choice Trust, a non-religious school tuition organization that awards scholarships to low-income parents to enable them to send their children to any qualified private school, regardless of whether the school is religious or non-religious. Parents Dennard and Moscoso have chosen to send their children to religious schools. As parties to the proceedings in the District Court and the United States Court of Appeals for the Ninth Circuit, they file this brief pursuant to Supreme Court Rule 12.6.*

---

* Parents filed a timely petition for writ of certiorari seeking review and urging summary reversal of the Ninth Circuit panel's decision in this case. No. 09-988. This Court vided Parents' petition with No. 09-987 and No. 09-991 and distributed all three petitions for conference on May 20, 2010. The two other petitions were granted, but Parents' petition is still pending before this Court

PARTIES TO THE PROCEEDINGS – Continued

Respondents, who were Plaintiffs below, and who sue in their capacity as taxpayers, are Kathleen M. Winn, Maurice Wolfthal, and Lynn Hoffman.

CORPORATE DISCLOSURE STATEMENT

The Arizona School Choice Trust does not have a parent company and is not publicly held.

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DECISIONS BELOW

Arizona law allows individuals to claim a tax credit for donations to school tuition organizations, which are tax-exempt charities that provide scholarships to help families send their children to private school. A.R.S. § 43-1089(A), (G)(3); Pet. App. 117a, 120a.[1] Solely because a majority of taxpayers have so far chosen to direct their charitable contributions to organizations that award scholarships to benefit children whose parents want them to attend religious schools, a panel of the United States Court of Appeals for the Ninth Circuit reversed the District Court's dismissal of this case and concluded that Arizona's Scholarship Tax Credit Program constitutes governmental endorsement of religion in violation of the Establishment Clause. The panel opinion is reported at 562 F.3d 1002 (9th Cir. 2009) and is reproduced in Pet. App. at 1a-46a.

Over the dissent of eight circuit judges, the Ninth Circuit on October 21, 2009 denied the three timely filed petitions for rehearing en banc. The panel concurred with the denial in a written opinion. The dissent emphasized that the panel decision conflicts with this Court's Establishment Clause precedents and jeopardizes other religion-neutral school choice

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[1] Petitioner Garriott's Appendix to Petition for Certiorari will be referred to throughout Parents' brief as "Pet. App." Petitioner Arizona Christian School Tuition Organization's Appendix to Petition for Certiorari will be referred as "ACSTO Pet. App." Parents' Appendix to this brief will be referred to as "Parents' App."

programs across the country. The dissenting and concurring opinions concerning rehearing are reported at 586 F.3d 649 (9th Cir. 2009) and are included at Pet. App. 64a-116a.

The District Court's decision granting the motion to dismiss is reported at 361 F. Supp. 2d 1117 (D. Ariz. 2005) and is included at Pet. App. 47a-63a.

This Court's prior decision in this case held that the federal Tax Injunction Act does not deprive federal courts of jurisdiction to hear challenges to state tax credit laws. *Hibbs v. Winn*, 542 U.S. 88 (2004). The Ninth Circuit panel's prior opinion in this case held the same. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Establishment Clause of the First Amendment to the U.S. Constitution, which declares that "Congress shall make no law respecting an establishment of religion," as it applies to state governments through the Fourteenth Amendment to the U.S. Constitution. The challenged Scholarship

Tax Credit Program is codified at A.R.S. § 43-1089.[2] Pet. App. 117a-120a.

STATEMENT OF THE CASE

Arizona is a pioneer in education reform and has been aggressively "expand[ing] the options available [to parents] in public education" for two decades. *Kotterman v. Killian*, 972 P.2d 606, 611 (Ariz. 1999). It adopted one of the nation's first—and by far most robust—charter school laws. A.R.S. §§ 15-181 – 15-189.03 (1994). It erased arbitrary geographic boundaries for public schools by requiring open public school enrollment. A.R.S. §§ 15-816 – 15-816.07 (1995). It then sought "to bring private institutions into the mix of educational alternatives open to the people of [Arizona]," *Kotterman*, 972 P.2d at 611, by adopting the Scholarship Tax Credit Program. A.R.S. § 43-1089 (1997).

The idea for the Scholarship Tax Credit Program originated with the Arizona School Choice Trust—one of the Parent-Intervenors—which was founded in 1993 to award privately funded scholarships. Arizona School Choice Trust, *ASCT's Generous Founders*,

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[2] Legislative amendments to the Scholarship Tax Credit Program will go into effect on December 31, 2010. 2010 Ariz. Sess. Laws, ch. 293, §§ 1-4. Parents' App. 1a-16a. The amendments do not affect the issues in this case, but Parents will discuss them as appropriate in their Argument.

http://www.asct.org/Founders.shtml (last visited July 27, 2010). As the program's primary sponsor explained, it "allows for a tax credit . . . for contributions to a tuition scholarship organization, such as the Arizona School Choice Trust Fund." Ariz. House of Rep. Comm. on Educ., Minutes of Meeting (Wed. Jan. 29, 1997), http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/43leg/1R/comm_min/House/0129%2EED.htm (last visited July 27, 2010). The program essentially changed what was "a tax deduction to a tax credit, enhancing the ability of these organizations to raise funds and [thereby] allowing more low-income children the opportunity to attend the school of their choice." *Id.*

The Scholarship Tax Credit Program authorizes individuals to claim a state tax credit of up to $500 per individual (or $1000 for married couples filing jointly) for donations to qualified school tuition organizations. A.R.S. § 43-1089(A); Pet. App. 117a. A qualified school tuition organization must be a tax-exempt charity under 26 U.S.C. § 501(c)(3) and must allocate 90 percent of the donations it receives to scholarships to help children attend private schools. A.R.S. § 43-1089(G)(3); Pet. App. 120a. To qualify as a tax-exempt organization, an entity must be "organized and operated exclusively" for, among other purposes, "religious, charitable, scientific . . . literary, or educational purposes. . . ." 26 U.S.C. § 501(c)(3). Consequently, "organizations unabashedly devoted to promoting religion—churches and other religious institutions—enjoy . . . direct economic tax benefits" under the federal tax code, *Kotterman*, 972 P.2d at

613 n.2, including deductibility of contributions, 26 U.S.C. § 170. The Scholarship Tax Credit Program thus allows school tuition organizations to operate precisely like any other federally recognized tax-exempt organization.

Arizona has continued to lead the nation in reforming education by expanding parental choice through religion-neutral scholarship programs. Due in large measure to the success of the Scholarship Tax Credit Program, Arizona enacted two corporately funded scholarship tax credit programs: a means-tested program for low- and middle-income children transferring from public to private schools, A.R.S. § 43-1183 (2006), and a program to fund scholarships for children with disabilities and children in the foster care system, A.R.S. § 43-1184 (2009).

Following its enactment in 1997, the Scholarship Tax Credit Program was immediately challenged in state court as allegedly violating the Establishment Clause. The Arizona Supreme Court rejected those claims because it was "persuaded that § 43-1089 falls within the parameters of the Establishment Clause." *Kotterman*, 972 P.2d at 616, *cert. denied*, 528 U.S. 921 (1999). After an exhaustive analysis, the Arizona Supreme Court concluded that the program "does not prefer one religion over another, or religion over non-religion. It aids a broad spectrum of citizens, allows a wide range of private choices, and does not have the primary effect of either advancing or inhibiting religion." *Id.* (citation omitted).

After this Court denied certiorari in *Kotterman*, Respondents filed this case in February 2000 in federal court. The District Court initially dismissed the case as barred by the federal Tax Injunction Act, but the Ninth Circuit reversed, *Winn*, 307 F.3d 1011, and this Court affirmed, *Hibbs*, 542 U.S. 88. Upon remand, the District Court granted Parents' motion to dismiss and held that, in light of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Respondents were unable to state a claim against this facially neutral tax credit program because it operates based on true private choice. Pet. App. 55a.

The Ninth Circuit reversed and held that, based on the allegations in Respondents' complaint, the program lacks religious neutrality as-applied and "carries with it the *imprimatur* of government endorsement."[3] Pet. App. 23a (panel) (citation omitted).

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[3] The Ninth Circuit panel opined that, because Respondents abandoned their facial challenge to the Scholarship Tax Credit Program, the Parent-Intervenors are no longer "being directly challenged" in this case. Pet. App. 7a-8a n.6 (panel). The panel said this because Respondents' as-applied challenge purportedly calls into question only the existence of—and taxpayers' donations to—religiously affiliated school tuition organizations and not donations to nonreligious school tuition organizations, even if the nonreligious organizations offer scholarships to both nonreligious and religious schools. Pet. App. 7a-8a n.6 (panel). However, the panel reinstated Respondents' challenge to the legislature's purpose for enacting the program. If the legislature enacted the program for an improper religious purpose, the program must be struck down in its entirety, i.e., it must be struck down as to every application, not just as to one particular application. *Church of the Lukumi Babalu Aye, Inc. v. City of*

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The panel first determined that the central question under the "endorsement inquiry is whether 'the reasonable observer would naturally perceive the aid program [in question] as *government* support for the advancement of religion.'" Pet. App. 37a (panel) (quoting *Mitchell v. Helms*, 530 U.S. 793, 843 (2000)) (alteration in original). The panel then concluded that a reasonable observer would believe that by giving taxpayers the free choice to donate to both religious and nonreligious school tuition organizations, the state has failed to provide any "reasonable assurance" that the taxpayers will advance the program's secular purpose. Pet. App. 40a (panel). It reached this conclusion without disputing that the program "is neutral with respect to the taxpayers who direct money to [school tuition organizations], or that any of the program's aid that reaches a [school tuition organization] does so only as a result of the genuine and independent choice of an Arizona taxpayer." Pet. App. 34a (panel).

The dissent from the denial of rehearing en banc found, however, that given the "layers of private, individual choice" under the program, it was "at a loss to understand how a reasonable observer—one fully informed about all matters related to the

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Hialeah, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."). The Parent-Intervenors thus have a direct stake in the outcome of this litigation.

program—could conclude that the *government itself* has endorsed religion in this case." Pet. App. 94a (en banc) (O'Scannlain, J., dissenting) (citation omitted).

SUMMARY OF THE ARGUMENT

For twenty-seven years, this Court has consistently rejected the argument Respondents make in this case: that the validity of a school choice program depends on how many participants or beneficiaries choose religious options. *Zelman*, 536 U.S. at 658 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."); *Mueller v. Allen*, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."). That argument is especially tenuous here because no payment of public funds is made, even indirectly, to religious entities. Instead, the program merely encourages taxpayers to donate to privately created charities in order to benefit other people's children. This Court's *Mueller* decision made it very clear that the connection between state and religious organizations is especially attenuated when a tax deduction or tax credit is involved. It is therefore not surprising that, until the panel decision, not a single court in the

last twenty-seven years had struck down a tax credit or deduction as unconstitutional under the Establishment Clause.

Arizona's Scholarship Tax Credit Program has multiple layers of true private choice, permits a wide range of religious and nonreligious entities to participate on completely neutral terms, and was adopted in a state that has more public and private educational options than any other in the nation. Respondents are asking this Court to overturn twenty-seven years of clear and settled law, an invitation this Court should heartily decline, especially given the important reliance that states and families increasingly place on the role of parental choice in improving America's public education system.

ARGUMENT

Arizona's Scholarship Tax Credit Program, A.R.S. § 43-1089, fits comfortably within a large and expanding framework of religion-neutral educational choice programs of the type approved by this Court in *Zelman*, 536 U.S. 639.[4] Yet Respondents assert that the program constitutes the establishment of religion in violation of the Establishment Clause of the First Amendment to the U.S. Constitution, which, as it applies to the states through the Fourteenth Amendment,

[4] Parents have read Petitioner Arizona Christian School Tuition Organization's merits brief and, being in full agreement, join their arguments that Respondents lack taxpayer standing.

forbids the enactment of any "law respecting an establishment of religion." U.S. Const. amend. I. "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970). Here, the Scholarship Tax Credit Program is clearly not a "law respecting an establishment of religion" because the government does not sponsor, provide financial support to, or involve itself with any religious organization.

To determine whether a challenged educational aid program contravenes the Establishment Clause, this Court asks "whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the 'effect' of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997). Here, there is no government action that manifests any religious purpose or that has the effect of advancing religion. "[T]he state's involvement stops with authorizing the creation of [school tuition organizations] and making tax credits available. After that, the government takes its hands off the wheel." Pet. App. 90a (en banc) (O'Scannlain, J., dissenting).

Any individual may create a school tuition organization and apply to the Internal Revenue Service for tax-exempt status. Any taxpayer may contribute to any school tuition organization and receive a tax credit for the amount contributed up to the statutorily defined limit of $500 per individual or $1000 for

married couples filing jointly. And any parent may apply for any scholarship offered by any school tuition organization. "That is not government endorsement: that is government nonchalance." Pet. App. 95a (en banc) (O'Scannlain, J., dissenting).

This Court reviews *de novo* the Ninth Circuit panel's decision reversing the dismissal of Respondents' complaint and construes Respondents' factual allegations in the light most favorable to them. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Accepting Respondents' factual allegations as true, they have not stated any facts that support their claim that the program lacks a valid secular purpose or that the legislature has acted to advance or endorse religion—nor could they, because the challenged program is neutral with regard to religion and operates on the basis of true private choice. *Cf. Zelman*, 536 U.S. at 653 ("[W]e have never found a program of true private choice to offend the Establishment Clause.").

I. The Arizona Legislature Acted With A Valid Secular Purpose When It Enacted The Scholarship Tax Credit Program.

To determine whether the state's stated secular purpose is in fact genuine, this Court looks through the eyes of an "objective observer" who "takes account

of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)); *see also Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987) (noting that the purpose inquiry looks to the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, . . . [and] the historical context of the statute, . . . and the specific sequence of events leading to [its] passage").

A. The Scholarship Tax Credit Program's Text And Contemporaneous Legislative History Manifest A Clear Secular Purpose To Increase Parental Choice In Education.

This Court is reluctant "to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller*, 463 U.S. at 394-95. Here, a valid secular purpose is readily discernable from the face of the challenged statute: "to allow [children] to attend any qualified school of their parents' choice." A.R.S. § 43-1089(G)(3); Pet. App. 120a.[6]

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[6] The recent amendments to the Scholarship Tax Credit Program retain this fundamental purpose. Parents' App. 9a (Title 43 amended by adding chapter 15 and A.R.S. § 43-1503(A),

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This legitimate governmental purpose rests on one of the most basic liberties recognized by this Court; namely, that parents—not government actors—have the right to direct the education and upbringing of their children. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). Moreover, there is nothing unconstitutional about encouraging private schooling as one option in the mix of educational alternatives available to parents. *Bd. of Educ. v. Allen*, 392 U.S. 236, 247-48 (1968) (recognizing that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience" and that "a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students").

The Scholarship Tax Credit Program is facially neutral with regard to religion. The program "on its face does not mention religion but is instead part of a secular state policy to maximize parents' choices as to where they send their children to school." Pet. App.

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which reads, "A certified school tuition organization must be established to receive contributions from taxpayers for the purposes of income tax credits under section 43-1089 and to pay educational scholarships or tuition grants to allow students to attend any qualified school of their parents' choice.").

54a (district court); *see also Kotterman*, 972 P.2d at 611-12 (finding a valid secular purpose because the program is part of the state's broader policy of maximizing parental choice).

The program also "does not provide taxpayers or students financial incentives which are skewed toward religious schools" or religious school tuition organizations. Pet. App. 57a (district court). Taxpayers receive the same tax credit amount regardless of whether they donate to a religious or nonreligious school tuition organization. And just like the tax deduction upheld in *Mueller*, this tax benefit is "only one among many." 463 U.S. at 396. Arizona offers a wide range of other tax credits to individual taxpayers. A.R.S. §§ 43-1071 – 43-1090.01. For example, individuals may claim a tax credit for contributions to organizations that provide assistance to the working poor. A.R.S. § 43-1088 (including, according to *Kotterman*, 972 P.2d at 613, churches, synagogues, missions, as well as other religious and nonreligious institutions). There is also a corresponding tax credit for contributions to public schools, adopted at the same time as the Scholarship Tax Credit Program. A.R.S. § 43-1089.01 (1997). Additionally, the class of beneficiaries under the challenged program is even broader than that approved in *Mueller* because any Arizona taxpayer, not just parents, may donate to a school tuition organization. A.R.S. § 43-1089(A); Pet. App. 117a. The "provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

Because it is available to all taxpayers and not just parents, the program "clearly achieves a greater level of neutrality" than the deduction upheld in *Mueller. Kotterman*, 972 P.2d at 613.

Arizona also does not skew incentives for parents receiving scholarships under the program to choose private schools—religious or otherwise—over public schools. "An Arizona student may attend any public school in the state without cost," including charter schools, "just as the students in *Zelman* could attend community and magnet schools for free." Pet. App. 57a (district court). By contrast, the average scholarship amount paid by school tuition organizations in 2009 was $1889. Arizona Dept. of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009* 3 (Apr. 21, 2010), *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2009.pdf. That is "a sum unlikely to cover all of the costs of private school attendance."[6] Pet. App. 57a (district court). Nor are parents permitted to make donations that benefit their own dependents.[7] As a result, and

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[6] A recent study found the average tuition at Arizona private schools was $4398 during the 2004-05 school year. Andrew Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, Goldwater Institute, Policy Report No. 213 (Oct. 17, 2006), *available at* http://www.goldwaterinstitute.org/article/1851.

[7] A.R.S. § 43-1089(E) currently says, "The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any

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considering all of the educational options available to parents in Arizona, it is difficult to perceive any *government*-created incentives to choose private schools.

Moreover, there is no hint in the legislative history of any improper or religious motive. The legislative history shows that the "primary sponsor's concern in introducing the bill was providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." Pet. App. 18a (panel) (citing Ariz. House of Rep. Comm. on Ways & Means, Minutes of Meeting, Tues. Jan. 21, 1997). When the program was enacted, only one school tuition organization was operating—the non-religious Arizona School Choice Trust. While the legislature had every reason to expect that other school tuition organizations would be formed, as indeed they have been, it had no way to predict how

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dependent of the taxpayer." Pet. App. 118a. The recent legislative amendments re-letter section (E) as letter (F) and adds at the end of the sentence:

> . . . or if the taxpayer designates a student beneficiary as a condition of the taxpayer's contribution to the school tuition organization. The tax credit is not allowed if the taxpayer, with the intent to benefit the taxpayer's dependent, agrees with one or more other taxpayers to designate each taxpayer's contribution to the school tuition organization for the direct benefit of the other taxpayer's dependent.

Parents' App. 3a.

many there would be, how many would be religiously affiliated, or how much money each would receive from taxpayer donations. The legislature "could hardly have had the 'purpose' of endorsing religion when it set up a plan that, for all it knew, could have resulted in absolutely no funding for religious entities." Pet. App. 114a (en banc) (O'Scannlain, J., dissenting).

Respondents do not claim that any contrary legislative history exists. Their complaint is bereft of any allegation suggesting that the legislature's stated purpose was disingenuous or a sham. And as explained below in Part I.C., the Ninth Circuit panel's only suggestion that such evidence could be adduced is based on an errant reading of the statute that would require the Department of Revenue to ignore the program's plain text in implementing the program.

In sum, there is nothing in the legislative history of the Scholarship Tax Credit Program that would lead an objective observer to believe that the legislature intended to endorse religion when it enacted the law.

B. The Scholarship Tax Credit Program Is Furthering The State's Valid Secular Purpose.

The objective observer, through whose eyes programs of this kind are to be perceived, is not only familiar with the legislative history but also with the

"implementation of the statute." *McCreary Cnty.*, 545 U.S. at 862. Here, the objective observer would see: (1) that school tuition organizations are privately created and must engage in extensive marketing and fundraising activities and that they operate without any governmental influence or control; (2) that private citizens decide whether and how much to contribute to school tuition organizations and make an independent choice regarding which school tuition organizations they will contribute to; and (3) that any family is free to apply to any school tuition organization to attend any school supported by that organization. "No *reasonable* observer would think this lengthy chain of choice suggests the government has endorsed religion." Pet. App. 115a (en banc) (O'Scannlain, J., dissenting).

The objective observer would also be aware of the steadily increasing number of school choice programs that have been flourishing in Arizona and around the country. In 2009-10, there were eighteen school choice programs in twelve states serving close to 180,000 students, including seven scholarship tax credit programs similar to the Arizona program challenged here. Alliance for School Choice, *Fighting for Opportunity: School Choice Yearbook 2009-10* 17 (2010), *available at* http://www.allianceforschoolchoice.org/UploadedFiles/ResearchResources/ASC_Yearbook_2010_FINAL.pdf. These numbers do not include the new voucher programs for children with disabilities adopted this past legislative session by Oklahoma and Louisiana.

2010 Okla. Sess. Laws 381; 2010 La. Sess. Law Serv. Act 515 (H.B. 216) (West).

As religion-neutral school choice programs increase in number and popularity, parents are increasingly expecting more options and more control over where their children go to school. States are responding by giving parents those choices—including choices among religious and nonreligious options on a wholly neutral basis—just as this Court has consistently held they may do. *Zelman*, 536 U.S. at 652-53 ("If numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.") (quoting *Mitchell*, 530 U.S. at 810); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486 (1986) ("Nor

does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion."); *Mueller*, 463 U.S. at 400 ("The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.").

Under those precedents, the decision to enact a tax credit program that allows taxpayers to donate to the religious or nonreligious school tuition organization of their choice would not lead an objective observer to conclude that the government acted with an improper purpose to advance religion—even if a majority of taxpayers in any given year contribute to religious school tuition organizations. Instead, the objective observer would conclude that the legislature's decision to allow religious charities to participate in the program is entirely consistent with the legislature's stated purpose of maximizing parental choice. That conclusion is solidified further when the objective observer considers that the empirical studies of school choice programs show they have been highly effective in promoting that purely secular—and perfectly valid—objective. *See, e.g.*, Jay P. Greene, Ph.D., *Education Myths: What Special-Interest Groups Want You To Believe About Our Schools—And Why It Isn't So* 147-56, 167-78 (2005) (summarizing the eight random assignment studies finding that school choice

programs "produce test scores that are at least as good as those produced in public schools, with happier parents, for about half of the cost" and also those studies demonstrating that "school choice helps public school students by providing public schools with positive incentives").

School choice programs, including Arizona's, have a proven track record of improving public school performance through competition. *See, e.g.*, Matthew Ladner, Ph.D., *Putting Arizona Education Reform to the Test: School Choice and Early Education Expansion*, Goldwater Institute, Policy Report No. 216 (Feb. 6, 2007), *available at* http://www.goldwaterinstitute.org/file/4264/download/4266 (finding that Tucson public schools facing competitive pressure from charters, tax-credit-funded scholarships, and home schooling achieved significant improvements in reading, math, and language arts scores relative to other local schools); David Figlio & Cassandra M.D. Hart, *Competitive Effects of Means-Tested School Vouchers*, National Center for Analysis of Longitudinal Data in Education Research, Working Paper No. 46 (June 2010), *available at* http://www.urban.org/uploadedpdf/1001393-means-tested-school-vouchers.pdf (analyzing Florida's corporate tax-credit-funded scholarship program and finding positive competitive effects on public schools).

The Scholarship Tax Credit Program also saves the state money and results in increased per-pupil funding for Arizona public schools. Susan L. Aud, Ph.D., *School Choice by the Numbers: The Fiscal*

Effect of School Choice Programs, 1990-2006, Milton and Rose D. Friedman Foundation (Apr. 2007), *available at* http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/243/voucher_savings_final.pdf (finding that the Scholarship Tax Credit Program saved state and local authorities $18 million); Susan L. Aud, Ph.D. & Vicki Murray, Ph.D., *Opening the Books: 2006 Annual Report on Arizona Public School Finance*, Goldwater Institute, Policy Brief No. 06-02 (Apr. 17, 2006), *available at* http://www.goldwaterinstitute.org/file/3269/download/3269 (finding that the Scholarship Tax Credit Program increases per-pupil funding in the public school system).

The point here is not that expanding parental options represents the best educational policy choice (though it very well might); rather, the point is that an objective observer would find it entirely plausible that the legislature might wish to include private schools within the available mix of educational options for purely secular purposes. Arizona's decision to include religious options in its completely neutral school choice program is certainly advancing the state's secular goal of increasing parental choice while also increasing parental satisfaction and improving public education.

C. The Ninth Circuit Panel's Attempt To Reframe Respondents' Purpose Challenge Must Fail Because It Relied On Irrelevant Governmental Actions As Well As An Erroneous Interpretation Of The Program.

The Ninth Circuit panel's attempt to resurrect Respondents' claim as an as-applied challenge fails for two reasons. First, post-enactment action by the executive branch is not relevant to discerning the legislature's motive for enacting the program. Second, the panel's reasoning relies on a misinterpretation of the program itself.

1. Post-Enactment Action By The Executive Branch Is Not Relevant To Determining Whether The Legislature Had A Valid Purpose For Enacting The Program.

When a legislature passes a law for an improper purpose, the constitutional violation occurs at the moment of enactment. A challenge to a statute's purpose is therefore a challenge to the statute as written, not as to any particular application.[8] That is

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[8] This Court previously considered a challenge to a statute's purpose only as an aspect of a facial challenge. *Bowen v. Kendrick*, 487 U.S. 589, 600-01 (1988). Because Respondents abandoned their facial challenge, Pet. App. 7a n.5 (panel), there is a strong argument they abandoned their challenge to the program's stated secular purpose.

why the only way to remedy a law that was passed with an unconstitutional religious purpose is to strike down the statute in its entirety. *Lukumi*, 508 U.S. at 534; *see also McCreary Cnty.*, 545 U.S. at 860 (holding that there can be "no neutrality when the government's ostensible object is to take sides").

Respondents' allegation that the legislature enacted the Scholarship Tax Credit Program to advance religion is an allegation that the legislature violated the Establishment Clause at the time it passed the challenged program. Because the alleged constitutional violation would have occurred before the program was ever implemented, post-enactment action by a separate branch of government is not evidence of a legislature's purpose for enacting a program. While it is conceivable that the executive branch might violate the Establishment Clause by applying a law in a manner that advances religion (for example, if the Arizona Department of Revenue encouraged taxpayers to donate to religious over nonreligious school tuition organizations), neither the executive branch nor private actors can pass a law for an improper purpose. That is why the subject of the inquiry is the legislature, not the executive branch or citizens. The question is whether the legislature had a valid purpose when it enacted the challenged program.

Under limited circumstances, non-legislative action might be probative of the legislature's purpose. This Court's decision in *Lukumi* illustrates when an inquiry into outside actions might shed light on the

legislature's purpose for enacting an otherwise neutral law. In *Lukumi*, this Court took notice of the fact that many residents expressed concern to the legislative branch about the religious practices of the Santeria church. 508 U.S. at 526. The legislature's response to the public's animosity was to enact several resolutions and ordinances aimed at preventing that church from engaging in its practice of ritual animal sacrifice. *Id.* Thus, private religious discrimination (or private action favoring religion) that actually prompts a legislative response can be used to show that an otherwise facially neutral law might have been motivated by an improper purpose. But here neither Respondents nor the panel identified any private conduct that is relevant to the purpose inquiry.

2. The Panel Misconstrued The Program Because Its Plain Language Permits Participation Of Any School Tuition Organization That Awards Scholarships To At Least Two Schools.

The panel attempted to make the Arizona Department of Revenue's implementation of the program relevant to the purpose inquiry by holding that the Department is acting contrary to the language of the program by allowing tax credits for donations to school tuition organizations that provide scholarships only to religious schools. However, in order to reach its conclusion, the panel ignored the plain language of the Scholarship Tax Credit Program and read into it

a nonexistent limitation on the ability of religiously affiliated school tuition organizations to participate in the program. The program's plain text allows school tuition organizations to limit scholarships to as few as two schools. The panel read into the language in A.R.S. § 43-1089(G)(3), which defines school tuition organizations as organizations that allocate scholarships "to allow [children] to attend any qualified school of their parents' choice," a requirement that school tuition organizations may not limit the number of schools to which they provide scholarships. Pet. App. 68a-69a (en banc). But A.R.S. § 43-1089(G)(3) goes on to say that "to qualify as a school tuition organization the charitable organization shall provide scholarships or tuition grants to students without limiting availability to only students of one school."[9] Pet. App. 120a.

The panel ignored this additional, clarifying language. The fact that some school tuition organizations will limit their scholarships to less than the entire universe of private schools is readily "apparent from the statute itself, which is satisfied so long as [school tuition organizations] provide scholarships to two or more schools, a fact plaintiffs themselves

[9] The recent amendments to the Scholarship Tax Credit Program retain this language. Parents' App. 10a (Title 43 amended by adding chapter 15 and A.R.S. § 43-1503(B)(2) which says, "To be eligible for certification and retain certification, the school tuition organization: Shall not limit the availability of educational scholarships or tuition grants to only students of one school" and deleting the existing A.R.S. § 43-1089(G)(3)).

recognize in their complaint." Pet. App. 113a (en banc) (O'Scannlain, J., dissenting) (citation omitted).

The panel's interpretation of A.R.S. § 43-1089(G)(3) not only conflicts with the plain language of the statute, it is at odds with the allegations in Respondents' complaint. ACSTO Pet. App. 119a (alleging that "[school tuition organizations] may (and most do) restrict their grants to students attending religious schools"). It is also contrary to the Arizona Supreme Court's interpretation of the statute, this Court's prior understanding of the law, and the Ninth Circuit's own prior opinion in this case. *Hibbs*, 542 U.S. at 95 (explaining that school tuition organizations "must designate at least two schools whose students will receive funds"); *Winn*, 307 F.3d at 1013 ("the statute provides that recipients of [a school tuition organization's] funds must be drawn from at least two different schools"); *Kotterman*, 972 P.2d at 614 (recognizing that school tuition organizations "may not limit grants to students of only one" private school); *id.* at 626 ("[A] group of taxpayers who subscribe to a particular religion may form [a school tuition organization] that will support only schools of that religion.") (Feldman, J., dissenting).

By erroneously construing the program to prohibit a practice that it clearly allows, the panel was able to accuse the Department of improperly allowing taxpayers to claim a tax credit for donations to school tuition organizations that award scholarships only to religious schools. Pet. App. 19a (panel). This untenable statutory construction is the necessary condition the panel needed to make the Department's

"implementation" of the program appear relevant to the purpose inquiry.

After transforming the program into something it is not, the panel stated that *if* Respondents can prove the legislature knew the Department would implement the statute by allowing tax credits for donations to religiously affiliated school tuition organizations, *then* this knowledge "could be probative" of the legislature's "expectations as to how assistance" under the Scholarship Tax Credit Program "would be directed in practice." Pet. App. 85a (en banc). But that reasoning is faulty because the text of the statute clearly allows religiously affiliated school tuition organizations to participate in the program and to limit scholarship awards only to religious schools.

The panel's attempt to shoehorn the Department's administration of the program—which is both neutral and statutorily authorized—into the purpose inquiry fails as a matter of text, logic, and precedent.

3. The Establishment Clause Has Never Been Construed To Prohibit Religious Groups From Participating In A Religion-Neutral Government Aid Program.

The panel's construction of the program is not only inconsistent with the program's text, but with the history of the Establishment Clause itself, which has never been held to require the exclusion of religious groups from a neutral educational aid program.

See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (holding that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary").

That the legislature permitted a wide variety of privately created and operated school tuition organizations to participate in the Scholarship Tax Credit Program on a neutral basis along with nonreligious organizations is not and cannot be evidence that the legislature's stated valid secular purpose was a sham. *Walz*, 397 U.S. at 689 (Brennan, J., concurring) ("Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."); *Hernandez v. Comm'r*, 490 U.S. 680, 696 (1989) (holding that 26 U.S.C. § 170 does not advance religion under the Establishment Clause by allowing taxpayers to deduct charitable "gifts to . . . religious organizations").

The legislature is vested with discretion as the state's education policymaker. "What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz*, 397 U.S. at 694 (Harlan, J., concurring). Here, the range of religious and nonreligious options reflects the state's pluralism. Rather than being a reflection of religious establishment, the wide variety

of school tuition organizations is a reflection of a robust and healthy diversity of beliefs.

II. The Scholarship Tax Credit Program Does Not Constitute Government Endorsement Of Religion.

Once a court is satisfied the legislature acted with a valid secular purpose, the next question is whether the law has the forbidden effect of endorsing religion. *Agostini*, 521 U.S. at 223. In *Zelman*, this Court held that educational aid programs that permit religious groups to participate on neutral terms and provide program participants genuine choice whether to direct that aid to religious or nonreligious schools are "not readily subject to challenge under the Establishment Clause." 536 U.S. at 652. As the dissent from the denial of rehearing en banc aptly observed, this case is notable "for what it does not involve: state action advancing religion." Pet. App. 87a (en banc) (O'Scannlain, J., dissenting). This is because under the Scholarship Tax Credit Program it is not "fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987).

Under *Zelman*, the panel's holding is erroneous for at least three reasons: (1) every decision under the tax credit program is private; (2) the panel's holding is premised on irrelevant annual statistics about where taxpayers donate their money; and (3) no

parent is coerced into sending his or her child to a religious school. The Scholarship Tax Credit Program is therefore not "readily subject to challenge under the Establishment Clause." *Zelman*, 536 U.S. at 652. The panel should have affirmed the District Court's dismissal of Respondents' complaint.

A. The Scholarship Tax Credit Program Operates On The Basis Of True Private Choice.

When a law is based on "true private choice, with no evidence that the State deliberately skew[s] incentives toward religious schools, [it is] sufficient for the program to survive scrutiny under the Establishment Clause." *Zelman*, 536 U.S. at 650. As this Court stated in *Mueller*, the "historic purposes of the [Establishment] [C]lause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." 463 U.S. at 400.

Private choice imbues every aspect of Arizona's Scholarship Tax Credit Program:

> [T]he *"government itself"* is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create [a school tuition organization]. Second, that [school tuition organization] must then decide to provide scholarships to religious schools.

> Third, taxpayers have to contribute to the [school tuition organization] in question. Finally, parents need to apply for a scholarship for their student.

Pet. App. 94a (en banc) (O'Scannlain, J., dissenting). The state's "involvement stops with authorizing the creation of [school tuition organizations] and making tax credits available. After that, the government takes its hands off the wheel." Pet. App. 90a (en banc) (O'Scannlain, J., dissenting). In this way, the Scholarship Tax Credit Program parallels the particular aspects of federal charitable deductions that this Court has found central to their constitutionality under the Establishment Clause. *Hernandez*, 490 U.S. at 696 (holding that tax deductions for charitable contributions to organizations created and operated exclusively for religious purposes neither "advance nor inhibit religion").

Considering that the government itself does not disburse the Scholarship Tax Credit Program's benefits, there is no way for the government to grant any special favors that might lead to a religious establishment. *See Mitchell*, 530 U.S. at 810. For example, once a school tuition organization is created, it is up to its board and staff to solicit charitable contributions from taxpayers, and the program provides no financial incentive for taxpayers to donate to religiously affiliated scholarship organizations over non-religious organizations. And as described above in Part I.A., parents also have no financial incentive to choose a religious education—in fact, there are

financial *disincentives* for parents to choose a private education—either religious or nonreligious, just as there were in *Zelman*. 536 U.S. at 654 ("The program here in fact creates financial *dis*incentives for religious schools. . . .").

The panel implicitly suggests that taxpayers are doing the government's bidding, but as described above, taxpayers have ample choices of school tuition organizations to donate to, as well as the choice to not donate at all. "In every respect and at every level, these are purely private choices, not government policy." Pet. App. 94a (en banc) (O'Scannlain, J., dissenting).

B. Annual Statistics Concerning Which School Tuition Organizations Taxpayers Choose To Donate To Are Irrelevant To The Constitutional Inquiry.

The Ninth Circuit panel relied heavily on annual statistics about where taxpayers choose to direct their donations to support its conclusion that the program constitutes governmental endorsement of religion. Pet. App. 30a-32a. If this Court were to sanction the use of such data, it could imperil many other tax credit programs in Arizona and nationwide. But such statistics are plainly irrelevant to the constitutional inquiry. *Zelman*, 536 U.S. at 650 (noting that in prior educational aid cases this Court "found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religions schools"); *Mueller*, 463 U.S. at 401 ("We would be

loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."). One reason this Court refuses to attribute constitutional significance to constantly fluctuating statistics is that it would lead to the "absurd result that a neutral school-choice program might be permissible" in states where low percentages of individuals choose religious schools, but not in states where high percentages of individuals choose religious schools. *Zelman*, 536 U.S. at 657.

The present case is a good example of the wisdom of this Court's decision not to evaluate the constitutionality of challenged programs based on constantly fluctuating data. For example, since this case was filed in 2000, there has been a consistent trend toward increased donations to nonreligious school tuition organizations. The most recent data reported to the Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009* (Apr. 21, 2010), *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2009.pdf, show that:

- The number of school tuition organizations has more than tripled from sixteen in 1998 to fifty-three in 2009. *Id.* at 3.
- In 2009, at least twenty-nine of the fifty-three school tuition organizations had no obvious religious affiliation. *Id.* at 8-9.

- The number of donations from taxpayers to school tuition organizations rose from 4248 (totaling $1.8 million) in 1998 to 73,391 (totaling $50.8 million) in 2009. *Id.* at 3.

- In 2009, two of the five largest school tuition organizations in terms of both donations received and scholarships awarded were nonreligious: the Arizona Scholarship Fund and the Institute for Better Education. Those two organizations received nearly $10 million—twenty percent of total donations. *Id.* at 8-9.

- In 2009, five of the ten largest school tuition organizations in terms of both donations received and scholarships awarded had no religious affiliation and received nearly thirty percent of total donations. *Id.* at 8-9. In 1998, according to Respondents' complaint, only six percent of program donations were made to nonreligious school tuition organizations.

- When all school tuition organizations are taken into account, nearly forty percent of funds were donated to nonreligious school tuition organizations (similar to the religiously affiliated organizations, many of the nonreligious organizations provide scholarships only to certain types of nonreligious schools, such as Montessori or Waldorf schools). *Id.* at 8-9.

- In 2009, 27,582 students used the scholarships to attend 370 different private schools—including nearly one hundred private schools

that have no obvious religious affiliation. *Id.* at 14-21.

In sum, the third-largest school tuition organization in 2009 had no religious affiliation, five of the ten largest organizations had no religious affiliation, and over 27,000 students used program scholarships to attend 370 different private schools—including nearly one hundred private schools that have no obvious religious affiliation. Over time, the program has become "less" religious rather than "more" religious—not because of any state action, but due to the private choices of the individuals participating in it. And while the pendulum may one day swing back toward religion, that swing would not be attributable to the government, but attributable to the private decisions of individual taxpayers and to the work of school tuition organizations whose employees must fundraise like other nonprofit organizations and convince taxpayers to donate to their organizations.

If Respondents were correct that the Scholarship Tax Credit Program skews incentives toward religion, one would expect that both the percentage of students attending religious schools and the percentage of scholarships reserved for use at religious schools would have jumped over the program's thirteen-year history. But the proportion of students attending religious schools has barely increased—while the percentage of scholarships reserved for use in religious schools has plummeted. In 1998, approximately seventy-five percent of private school students in Arizona were enrolled in religious schools. Andrew Coulson, *The Case of the Missing Evidence*, Cato @

Liberty blog (Jan. 26, 2010 8:31 AM), http://www.cato-at-liberty.org/2010/01/26/the-case-of-the-missing-evidence (relying on U.S. Dep't of Educ. "Private School Universe Survey"). In 2008, that number was eighty-one percent, a mere five percent increase over a ten-year period. *Id.* During the same time period, taxpayers donated an increasing amount of money to school tuition organizations that award scholarships to both religious and nonreligious schools—and some that award scholarships only to nonreligious schools. Respondents allege that in 1998, ninety-four percent of donated funds went to religiously affiliated school tuition organizations. ACSTO App. 120a. But in 2008 only sixty-five percent of funds were donated to religious school tuition organizations. Coulson, *supra*. This means that the percentage of scholarships available for use at nonreligious schools is nearly twice as large as the percentage of families who choose to attend nonreligious private schools.

Evaluating the constitutionality of a neutral tax credit program in light of how much money individuals donate to religious organizations in any given year jeopardizes numerous other tax credit programs in Arizona and in other states that allow both religious and nonreligious charitable institutions to accept tax-credit-eligible donations. *E.g.*, A.R.S. § 43-1183 (corporate tax credit for low-income scholarships); A.R.S. § 43-1184 (corporate tax credit for scholarships for children with special needs); A.R.S. § 43-1088 (individual tax credit for contributions to organizations that assist the working poor); Ga. Code Ann. § 48-7-29.16 (2009) (individual and corporate

tax credits for donations to student scholarship organizations); Iowa Code § 422.11S (2010) (individual tax credit for donations to school tuition organizations); 72 Pa. Cons. Stat. §§ 8701-F to 8708-F (2009) (corporate tax credit for contributions to scholarship organizations); R.I. Gen. Laws §§ 44-62-1 to -7 (2009) (corporate tax credit for donations to scholarship organizations).

The panel's reasoning could also easily spill over into challenges to state and federal tax deductions and exemptions. Americans donate significant sums each year to religious charities. The panel's holding, if logically and consistently applied, places the constitutionality of other tax benefits in grave jeopardy. For example, the tax exemption approved in *Walz* is far more valuable to religious groups than the indirect, third-party tax credit at issue here. A credit merely reduces by a small amount the taxes owed by individual taxpayers—but an exemption allows the religious organization itself to completely escape the government's taxing authority.

In a futile attempt to avoid those consequences, the panel contrived an artificial distinction between tax credits and tax deductions. But this "appear[s] to be a matter of form rather than substance." *Kotterman*, 972 P.2d at 618 (finding no "principled" distinction between tax credits and "other established tax policy equivalents like deductions and exemptions"). Indeed, there is no principled standard by which to evaluate different types of tax benefits. *See Mueller*, 463 U.S. at 412 n.5 ("[T]he constitutionality of a tax

benefit does not turn on whether the benefit is in the form of a deduction from gross income or a tax 'credit.'") (Marshall, J., dissenting).

The panel placed a heavy emphasis on the fact that Arizona's tax credit is a dollar-for-dollar credit in an effort to distinguish tax credits from tax deductions. Pet. App. 14a (panel) ("By structuring the program as a dollar-for-dollar tax credit, the Arizona legislature has effectively created a grant program whereby the state legislature's funding of [school tuition organizations] is mediated through Arizona taxpayers."). But not all tax credits are dollar-for-dollar. At what point does a tax credit violate the constitution? Is it only at one hundred percent? Would a credit that allowed the taxpayer to claim eighty percent of the contribution pass muster? The panel provides no guidance on this crucial question. Fortunately, there is no need to answer the question because this inquiry is irrelevant to the constitutionality of facially neutral laws based on private choice.

C. The Scholarship Tax Credit Program Is Just One Among Many Educational Options Available To Arizona Parents.

Another critical question in determining whether the Scholarship Tax Credit Program unconstitutionally endorses religion is to ask whether it coerces parents into sending their children to religious schools. *Zelman*, 536 U.S. at 655-56. The answer to that question is clearly no because it "must be

answered by evaluating *all* options [the state] provides [its] schoolchildren, only one of which is to obtain a program scholarship and . . . choose a religious school." *See id.* at 656; *see also id.* at 663 (O'Connor, J., concurring) (emphasizing that this Court's inquiry "should consider all reasonable educational alternatives to religious schools that are available to parents").

The Ninth Circuit panel "did not even engage in this inquiry." Pet. App. 104a (en banc) (O'Scannlain, J. dissenting). Instead, it "reject[ed] the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice." Pet. App. 33a (panel). But this inquiry does not merely ask whether a public school system exists. Rather, the court must evaluate and consider the full range of nonreligious educational options provided to parents by the state.

Arizona has, for a long time, led the nation in offering families educational choice. Jay P. Greene, Ph.D., *The Education Freedom Index*, Manhattan Institute for Policy Research, Civic Report No. 14 (Sept. 2000), *available at* http://www.manhattan-institute.org/html/cr_14.htm (ranking Arizona first in educational freedom). It continues to do so with its recent adoption of the tax credit programs tailored to serve low-income families and families with children with special needs. Alliance for School Choice, http://www.allianceforschoolchoice.org/StateSchoolChoice/StateSchoolChoice_Arizona (last visited July 27, 2010). Families who want their children to receive a nonreligious

education have ample options from which to choose, including nearly one hundred nonreligious private schools that enroll students receiving scholarships from school tuition organizations. Arizona's charter schools now constitute twenty-five percent of all public schools, with a total of 509 charter schools, and ten percent of public school students are enrolled in a charter school. Arizona Charter School Association, *About Arizona Charter Schools*, http://www.azcharters.org/pages/schools-basic-statistics (last visited July 27, 2010).[10] And given Arizona's open public school enrollment statute, it is fair to say that every child in Arizona attends a school of choice.

The panel suggested that taxpayers, because they have a genuine choice as to where they donate their money, somehow limit—rather than expand—parental choice by directing large sums of money to religiously affiliated school tuition organizations. Pet. App. 43a-45a (panel). But it is undisputed that tax-credit-funded scholarships bring more educational options within the financial means of more families, and thus it is bizarre to say they limit choice. Moreover, "[t]he question is not whether a parent's choice is somehow limited or constrained, the question is

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[10] Arizona has also established a "virtual academy" that offers a public school education online. Arizona Virtual Academy, http://www.k12.com/azva (last visited July 27, 2010). And local school districts have established "traditional academies" in addition to the common district schools. *See, e.g.*, Chandler Traditional Academy, http://www.mychandlerschools.org/freedom (last visited July 27, 2010).

whether the *government* has somehow limited or constrained the choice." Pet. App. 97a (en banc) (O'Scannlain, J., dissenting). Even if private decisions inhibit choice—and here they do not—that would be irrelevant to the constitutional inquiry.

In *Zelman*, for instance, many nonreligious private schools chose not to participate in the voucher program. 536 U.S. at 656-57. Neighboring public schools also refused to participate. *Id.* This resulted in the program participants not being able to use their voucher to attend more than a handful of nonreligious private or public schools. *Id.* Yet *Zelman* refused to "attribute constitutional significance" to these private decisions because doing so would mean that a facially neutral school choice program might be constitutional in some places or at certain times, but not others. *Id.* at 657. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations," or in this case, why most taxpayers choose to donate to religious school tuition organizations. *Id.* at 658.

Applying this principle to this case, even if all taxpayers suddenly chose to donate to religious school tuition organizations, the Scholarship Tax Credit Program would still be constitutional. Indeed, the program would still achieve its secular purpose of increasing parental choice by creating more educational options for Arizona parents.

Arizonans enjoy the greatest array of educational options of any parents in America. The panel chose to ignore this fact. But the existence of those options clearly affects the decisions Arizona parents make about how and where to educate their children. Arizona parents do not make decisions in a vacuum consisting only of the options available within the Scholarship Tax Credit Program (which include a significant number of nonreligious private schools and nonreligious scholarships). Instead, they choose among charter schools, regular public schools—including schools across district boundaries—as well as traditional academies, magnet schools, virtual schools, and even home school. Given all of these nonreligious options, both public and private, no family in Arizona is remotely coerced into choosing a religious education, nor can any intent to coerce families to choose religion plausibly be attributed to the legislature. The Ninth Circuit panel's conclusion that offering taxpayers a tax credit—on perfectly neutral terms—for donations to either nonreligious or religious school tuition organizations is the equivalent of the state coercing parents into sending their children to religious private schools is profoundly mistaken.

CONCLUSION

Arizona's Scholarship Tax Credit Program is the product of a neutral law that allows a wide array of religious and nonreligious organizations to participate

and leaves the amount of support these organizations receive entirely in the hands of private individuals. The Program's design and operation is reflective of a growing number of school choice programs nationally, all of which fit comfortably into this Court's past precedents upholding neutral educational assistance programs that direct aid to religious institutions only as a matter of private choice.

Parents respectfully ask this Court to reverse the Ninth Circuit's decision.

Respectfully submitted,

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July 30, 2010

Senate Engrossed House Bill

State of Arizona

House of Representatives

Forty-ninth Legislature

Second Regular Session

2010

HOUSE BILL 2664[1]

AN ACT

Amending section 43-1089, Arizona Revised Statutes; amending title 43, Arizona Revised Statutes, by adding chapter 15; relating to school tuition organizations.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 43-1089, Arizona Revised Statutes, is amended to read:

43-1089. Credit for contributions to school tuition organization; definitions

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions by the taxpayer or on the taxpayer's behalf pursuant to section 43-401, subsection ~~H~~ I during the

[1] The text of the legislative amendments to the Scholarship Tax Credit Program is also available at http://www.azleg.gov/legtext/49leg/2r/bills/hb2664s.pdf (last visited July 27, 2010).

taxable year to a school tuition organization~~, but not exceeding~~ THAT IS CERTIFIED PURSUANT TO CHAPTER 15 OF THIS TITLE AT THE TIME OF DONATION. EXCEPT AS PROVIDED BY SUBSECTION C OF THIS SECTION, THE AMOUNT OF THE CREDIT SHALL NOT EXCEED:

1. Five hundred dollars in any taxable year for a single individual or a head of household.

~~2. Eight hundred twenty-five dollars in taxable year 2005 for a married couple filing a joint return.~~

~~3.~~2. One thousand dollars in ~~taxable year 2006 and~~ any ~~subsequent~~ taxable year for a married couple filing a joint return.

B. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

C. FOR EACH TAXABLE YEAR BEGINNING ON OR AFTER JANUARY 1, THE DEPARTMENT SHALL ADJUST THE DOLLAR AMOUNTS PRESCRIBED BY SUBSECTION A, PARAGRAPHS 1 AND 2 OF THIS SECTION ACCORDING TO THE AVERAGE ANNUAL CHANGE IN THE METROPOLITAN PHOENIX CONSUMER PRICE INDEX PUBLISHED BY THE UNITED STATES BUREAU OF LABOR STATISTICS, EXCEPT THAT THE DOLLAR AMOUNTS SHALL NOT BE REVISED DOWNWARD BELOW THE AMOUNTS ALLOWED IN THE PRIOR TAXABLE YEAR. THE REVISED

DOLLAR AMOUNTS SHALL BE RAISED TO THE NEAREST WHOLE DOLLAR.

~~C.~~ D. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

~~D.~~ E. The credit allowed by this section is in lieu of any deduction pursuant to section 170 of the internal revenue code and taken for state tax purposes.

~~E.~~ F. The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer OR IF THE TAXPAYER DESIGNATES A STUDENT BENEFICIARY AS A CONDITION OF THE TAXPAYER'S CONTRIBUTION TO THE SCHOOL TUITION ORGANIZATION. THE TAX CREDIT IS NOT ALLOWED IF THE TAXPAYER, WITH THE INTENT TO BENEFIT THE TAXPAYER'S DEPENDENT, AGREES WITH ONE OR MORE OTHER TAXPAYERS TO DESIGNATE EACH TAXPAYER'S CONTRIBUTION TO THE SCHOOL TUITION ORGANIZATION FOR THE DIRECT BENEFIT OF THE OTHER TAXPAYER'S DEPENDENT.

~~F. A school tuition organization that receives a voluntary cash contribution pursuant to subsection A shall report electronically to the department, in a~~

~~form prescribed by the department, by February 28 of each year the following information:~~

~~1. The name, address and contact name of the school tuition organization.~~

~~2. The total number of contributions received during the previous calendar year.~~

~~3. The total dollar amount of contributions received during the previous calendar year.~~

~~4. The total number of children awarded educational scholarships or tuition grants during the previous calendar year.~~

~~5. The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.~~

~~6. For each school to which educational scholarships or tuition grants were awarded:~~

~~(a) The name and address of the school.~~

~~(b) The number of educational scholarships and tuition grants awarded during the previous calendar year.~~

~~(c) The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.~~

G. For the purposes of this section:

1. "Handicapped student" means a student who has any of the following conditions:

(a) Hearing impairment.

(b) Visual impairment.

(c) Developmental delay.

(d) Preschool severe delay.

(e) Speech/language impairment.

2. "Qualified school":

(a) Means a nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

(b) DOES NOT INCLUDE A CHARTER SCHOOL OR PROGRAMS OPERATED BY CHARTER SCHOOLS.

~~3. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under section 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.~~

Sec. 2. Title 43, Arizona Revised Statutes, is amended by adding chapter 15, to read:

CHAPTER 15

SCHOOL TUITION ORGANIZATIONS FOR INDIIDUAL CONTRIBUTIONS

ARTICLE 1. GENERAL PROVISIONS

43-1501. Definitions

IN THIS CHAPTER, UNLESS THE CONTEXT OTHERWISE REQUIRES:

1. "ALLOCATE" INCLUDES RESERVING MONEY FOR AN AWARD OF A MULTIYEAR EDUCATIONAL SCHOLARSHIP OR TUITION GRANT FOR A SPECIFIC STUDENT.

2. "FISCAL YEAR" MEANS THE FISCAL YEAR OF THE STATE AS PRESCRIBED IN SECTION 35-102.

3. "QUALIFIED SCHOOL" HAS THE SAME MEANING PRESCRIBED IN SECTION 43-1089.

43-1502. Certification as a school tuition organization

A. A NONPROFIT ORGANIZATION IN THIS STATE THAT IS EXEMPT OR HAS APPLIED FOR EXEMPTION FROM FEDERAL TAXATION UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE MAY APPLY TO THE DEPARTMENT OF REVENUE FOR CERTIFICATION AS A SCHOOL

TUITION ORGANIZATION, AND THE DEPARTMENT SHALL CERTIFY THE SCHOOL TUITION ORGANIZATION IF IT MEETS THE REQUIREMENTS PRESCRIBED BY THIS CHAPTER. AN ORGANIZATION MUST APPLY FOR CERTIFICATION ON A FORM PRESCRIBED AND FURNISHED ON REQUEST BY THE DEPARTMENT.

B. THE DEPARTMENT SHALL:

1. MAINTAIN A PUBLIC REGISTRY OF CURRENTLY CERTIFIED SCHOOL TUITION ORGANIZATIONS.

2. MAKE THE REGISTRY AVAILABLE TO THE PUBLIC ON REQUEST.

3. POST THE REGISTRY ON THE DEPARTMENT'S OFFICIAL WEBSITE.

C. THE DEPARTMENT SHALL SEND WRITTEN NOTICE BY CERTIFIED MAIL TO A SCHOOL TUITION ORGANIZATION IF THE DEPARTMENT DETERMINES THAT THE SCHOOL TUITION ORGANIZATION HAS ENGAGED IN ANY OF THE FOLLOWING ACTIVITIES:

1. FAILING OR REFUSING TO ALLOCATE AT LEAST NINETY PER CENT OF ANNUAL REVENUES FOR EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS.

2. FAILING OR REFUSING TO FILE THE ANNUAL REPORTS REQUIRED BY SECTION 43-1504.

3. LIMITING AVAILABILITY OF SCHOLARSHIPS TO STUDENTS OF ONLY ONE SCHOOL.

4. ENCOURAGING, FACILITATING OR KNOWINGLY PERMITTING TAXPAYERS TO ENGAGE IN ACTIONS PROHIBITED BY THIS ARTICLE.

5. AWARDING, RESTRICTING OR RESERVING EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS FOR USE BY A PARTICULAR STUDENT BASED SOLELY ON THE RECOMMENDATION OF THE DONOR.

D. A SCHOOL TUITION ORGANIZATION THAT RECEIVES NOTICE FROM THE DEPARTMENT PURSUANT TO SUBSECTION C OF THIS SECTION HAS NINETY DAYS TO CORRECT THE VIOLATION IDENTIFIED BY THE DEPARTMENT IN THE NOTICE. IF A SCHOOL TUITION ORGANIZATION FAILS OR REFUSES TO COMPLY AFTER NINETY DAYS, THE DEPARTMENT MAY REMOVE THE ORGANIZATION FROM THE LIST OF CERTIFIED SCHOOL TUITION ORGANIZATIONS AND SHALL MAKE AVAILABLE TO THE PUBLIC NOTICE OF REMOVAL AS SOON AS POSSIBLE. AN ORGANIZATION THAT IS REMOVED FROM THE LIST OF CERTIFIED SCHOOL TUITION ORGANIZATIONS MUST NOTIFY ANY TAXPAYER WHO ATTEMPTS TO MAKE A CONTRIBUTION THAT THE CONTRIBUTION IS NOT ELIGIBLE FOR THE TAX CREDIT AND OFFER TO REFUND ALL DONATIONS RECEIVED AFTER

THE DATE OF THE NOTICE OF TERMINATION OF CERTIFICATION.

E. A SCHOOL TUITION ORGANIZATION MAY REQUEST AN ADMINISTRATIVE HEARING ON THE REVOCATION OF ITS CERTIFICATION AS PROVIDED BY TITLE 41, CHAPTER 6, ARTICLE 10. EXCEPT AS PROVIDED IN SECTION 41-1092.08, SUBSECTION H, A DECISION OF THE DEPARTMENT IS SUBJECT TO JUDICIAL REVIEW PURSUANT TO TITLE 12, CHAPTER 7, ARTICLE 6.

43-1503. Operational requirements for school tuition organizations; notice; qualified schools

A. A CERTIFIED SCHOOL TUITION ORGANIZATION MUST BE ESTABLISHED TO RECEIVE CONTRIBUTIONS FROM TAXPAYERS FOR THE PURPOSES OF INCOME TAX CREDITS UNDER SECTION 43-1089 AND TO PAY EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS TO ALLOW STUDENTS TO ATTEND ANY QUALIFIED SCHOOL OF THEIR PARENTS' CHOICE.

B. TO BE ELIGIBLE FOR CERTIFICATION AND RETAIN CERTIFICATION, THE SCHOOL TUITION ORGANIZATION:

1. MUST ALLOCATE AT LEAST NINETY PER CENT OF ITS ANNUAL REVENUE FOR EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS.

2. SHALL NOT LIMIT THE AVAILABILITY OF EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS TO ONLY STUDENTS OF ONE SCHOOL.

3. MAY ALLOW DONORS TO RECOMMEND STUDENT BENEFICIARIES, BUT SHALL NOT AWARD, DESIGNATE OR RESERVE SCHOLARSHIPS SOLELY ON THE BASIS OF DONOR RECOMMENDATIONS.

4. SHALL NOT ALLOW DONORS TO DESIGNATE STUDENT BENEFICIARIES AS A CONDITION OF ANY CONTRIBUTION TO THE ORGANIZATION, OR FACILITATE, ENCOURAGE OR KNOWINGLY PERMIT THE EXCHANGE OF BENEFICIARY STUDENT DESIGNATIONS IN VIOLATION OF SECTION 43-1089, SUBSECTION F.

C. A SCHOOL TUITION ORGANIZATION SHALL INCLUDE THE FOLLOWING NOTICE IN ANY PRINTED MATERIALS SOLICITING DONATIONS, IN APPLICATIONS FOR SCHOLARSHIPS AND ON ITS WEBSITE:

NOTICE

A SCHOOL TUITION ORGANIZATION CANNOT AWARD, RESTRICT OR RESERVE SCHOLARSHIPS SOLELY ON THE BASIS OF A DONOR'S RECOMMENDATION.

A TAXPAYER MAY NOT CLAIM A TAX CREDIT IF THE TAXPAYER AGREES TO SWAP DONATIONS WITH ANOTHER TAXPAYER TO BENEFIT EITHER TAXPAYER'S OWN DEPENDENT.

D. IN EVALUATING APPLICATIONS AND AWARDING, DESIGNATING OR RESERVING SCHOLARSHIPS, A SCHOOL TUITION ORGANIZATION:

1. SHALL NOT AWARD, DESIGNATE OR RESERVE A SCHOLARSHIP SOLELY ON THE RECOMMENDATION OF ANY PERSON CONTRIBUTING MONEY TO THE ORGANIZATION, BUT MAY CONSIDER THE RECOMMENDATION AMONG OTHER FACTORS.

2. SHALL CONSIDER THE FINANCIAL NEED OF APPLICANTS.

E. A QUALIFIED SCHOOL SHALL NOT ACCEPT AN EDUCATIONAL SCHOLARSHIP OR TUITION GRANT FROM A SCHOOL TUITION ORGANIZATION IN AN AMOUNT THAT EXCEEDS THE SCHOOL'S TOTAL COST OF EDUCATING THE STUDENT IN WHOSE NAME THE SCHOLARSHIP OR GRANT IS RECEIVED.

43-1504. Annual report

ON OR BEFORE SEPTEMBER 30 OF EACH YEAR, EACH SCHOOL TUITION ORGANIZATION SHALL REPORT ELECTRONICALLY TO THE DEPARTMENT, IN A FORM PRESCRIBED BY THE DEPARTMENT, THE FOLLOWING INFORMATION, SEPARATELY COMPILED AND IDENTIFIED FOR THE PURPOSES OF SECTION 43-1089:

1. THE NAME, ADDRESS AND CONTACT PERSON OF THE SCHOOL TUITION ORGANIZATION.

2. THE TOTAL NUMBER OF CONTRIBUTIONS RECEIVED DURING THE PREVIOUS FISCAL YEAR.

3. THE TOTAL DOLLAR AMOUNT OF CONTRIBUTIONS RECEIVED DURING THE PREVIOUS FISCAL YEAR.

4. THE TOTAL NUMBER OF CHILDREN AWARDED EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS DURING THE PREVIOUS FISCAL YEAR.

5. THE TOTAL DOLLAR AMOUNT OF:

(A) EDUCATIONAL SCHOLARSHIPS AND TUITION GRANTS DISTRIBUTED DURING THE PREVIOUS FISCAL YEAR.

(B) MONEY BEING HELD FOR IDENTIFIED STUDENTS' SCHOLARSHIPS AND TUITION GRANTS IN FUTURE YEARS.

6. THE COST OF AUDITS PURSUANT TO SECTION 43-1505 PAID DURING THE FISCAL YEAR.

7. THE TOTAL DOLLAR AMOUNT OF EDUCATIONAL SCHOLARSHIPS AND TUITION GRANTS AWARDED DURING THE PREVIOUS FISCAL YEAR TO:

(A) STUDENTS WHOSE FAMILY INCOME MEETS THE ECONOMIC ELIGIBILITY REQUIREMENTS ESTABLISHED UNDER THE NATIONAL SCHOOL LUNCH AND CHILD NUTRITION ACTS

(42 UNITED STATES CODE SECTIONS 1751 THROUGH 1785) FOR FREE OR REDUCED PRICE LUNCHES.

(B) STUDENTS WHOSE FAMILY INCOME EXCEEDS THE THRESHOLD PRESCRIBED BY SUBDIVISION (A) OF THIS PARAGRAPH BUT DOES NOT EXCEED ONE HUNDRED EIGHTY-FIVE PER CENT OF THE ECONOMIC ELIGIBILITY REQUIREMENTS ESTABLISHED UNDER THE NATIONAL SCHOOL LUNCH AND CHILD NUTRITION ACTS (42 UNITED STATES CODE SECTIONS 1751 THROUGH 1785) FOR FREE OR REDUCED PRICE LUNCHES.

8. FOR EACH SCHOOL TO WHICH EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS WERE AWARDED:

(A) THE NAME AND ADDRESS OF THE SCHOOL.

(B) THE NUMBER OF EDUCATIONAL SCHOLARSHIPS AND TUITION GRANTS AWARDED DURING THE PREVIOUS FISCAL YEAR.

(C) THE TOTAL DOLLAR AMOUNT OF EDUCATIONAL SCHOLARSHIPS AND TUITION GRANTS AWARDED DURING THE PREVIOUS FISCAL YEAR.

9. THE NAMES, JOB TITLES AND ANNUAL SALARIES OF THE THREE EMPLOYEES WHO RECEIVE THE HIGHEST ANNUAL SALARIES FROM THE SCHOOL TUITION ORGANIZATION.

43-1505. Audits and financial reviews

A. ON OR BEFORE SEPTEMBER 30 OF EACH YEAR, EACH SCHOOL TUITION ORGANIZATION THAT RECEIVED ONE MILLION DOLLARS OR MORE IN TOTAL DONATIONS IN THE PREVIOUS FISCAL YEAR SHALL PROVIDE FOR A FINANCIAL AUDIT OF THE ORGANIZATION. THE AUDIT MUST BE CONDUCTED IN ACCORDANCE WITH GENERALLY ACCEPTED AUDITING STANDARDS AND MUST EVALUATE THE ORGANIZATION'S COMPLIANCE WITH THE FISCAL REQUIREMENTS OF THIS ARTICLE. THE AUDIT MUST BE CONDUCTED BY AN INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT LICENSED IN THIS STATE. THE CERTIFIED PUBLIC ACCOUNTANT AND THE FIRM THE CERTIFIED PUBLIC ACCOUNTANT IS AFFILIATED WITH SHALL BE INDEPENDENT WITH RESPECT TO THE ORGANIZATION, ITS OFFICERS AND DIRECTORS, SERVICES PERFORMED AND ALL OTHER INDEPENDENT RELATIONSHIPS PRESCRIBED BY GENERALLY ACCEPTED AUDITING STANDARDS.

B. ON OR BEFORE SEPTEMBER 30 OF EACH YEAR, EACH SCHOOL TUITION ORGANIZATION THAT RECEIVED LESS THAN ONE MILLION DOLLARS IN TOTAL DONATIONS IN THE PREVIOUS FISCAL YEAR SHALL PROVIDE FOR A FINANCIAL REVIEW OF THE ORGANIZATION. THE REVIEW MUST BE CONDUCTED IN ACCORDANCE WITH STANDARDS FOR ACCOUNTING

AND REVIEW SERVICES AND MUST EVALUATE THE ORGANIZATION'S COMPLIANCE WITH THE FISCAL REQUIREMENTS OF THIS ARTICLE. THE REVIEW MUST BE CONDUCTED BY AN INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT LICENSED IN THIS STATE. THE CERTIFIED PUBLIC ACCOUNTANT AND THE FIRM THE CERTIFIED PUBLIC ACCOUNTANT IS AFFILIATED WITH SHALL BE INDEPENDENT WITH RESPECT TO THE ORGANIZATION, ITS OFFICERS AND DIRECTORS, SERVICES PERFORMED AND ALL OTHER INDEPENDENT RELATIONSHIPS PRESCRIBED BY GENERALLY ACCEPTED AUDITING STANDARDS.

C. WITHIN FIVE DAYS AFTER RECEIVING THE AUDIT OR FINANCIAL REVIEW THE SCHOOL TUITION ORGANIZATION SHALL FILE A SIGNED COPY OF THE AUDIT OR FINANCIAL REVIEW WITH THE DEPARTMENT.

D. THE SCHOOL TUITION ORGANIZATION SHALL PAY THE FEES AND COSTS OF THE CERTIFIED PUBLIC ACCOUNTANT UNDER THIS SECTION FROM THE ORGANIZATION'S OPERATING MONIES. THE FEES AND COSTS SHALL BE EXCLUDED FROM THE CALCULATION OF TOTAL REVENUES SPENT ON SCHOLARSHIPS AND TUITION GRANTS.

RESPONDENT'S BRIEF

Nos. 09-987, 09-991

Supreme Court, U.S.
FILED
SEP 15 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Arizona has enacted a "school-choice" program that provides scholarships to students at religious and other non-public schools. The scholarships are funded by state income tax revenues. They are awarded by "school tuition organizations" (STOs) that the Arizona Department of Revenue certifies to receive tax revenues and to award program scholarships from those revenues on the state's behalf. State tax revenues pay for all of the costs of the program, and STOs have no function other than their participation in the program. STOs are monitored by the Department of Revenue, which may withdraw certification and terminate them for failure to comply with the state's rules. The STOs that award the majority of the program's scholarships are religious organizations that discriminate on the basis of religion in selecting scholarship recipients, and that require children to enroll in religious schools in order to receive scholarships.

The questions presented are:

1. Does the program, as thus applied, violate the Establishment Clause?

2. Do Arizona taxpayers, whose taxes support all of the costs of the program, have standing in federal court to challenge its constitutionality?

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STATEMENT

Introduction

This case is an Establishment Clause challenge to an Arizona tuition scholarship program. Plaintiffs (respondents in this Court) are Arizona taxpayers. Their challenge is not to the program statute on its face, but to the statute as applied. The program is funded entirely by state income-tax revenues. Program scholarships are awarded by state certified and supervised school tuition organizations (STOs). STOs obtain all of the funds they award as scholarships from annual payments made to the STOs by some Arizona income-tax payers, who are credited with the full amount of those payments against the income taxes they owe to the state. Respondents' suit is based on their allegation that the STOs that award most of the program scholarships are religious organizations that award scholarships to children on the basis of religion, and that require children to enroll in religious schools in order to receive scholarships. The controlling issue in the case is whether the program should be treated as a private charitable program, as petitioners contend, or as a government spending program subject to the restrictions of the Establishment Clause.

After the decision below, reversing the dismissal of respondents' complaint, and about four weeks before the Court granted the petitions for certiorari, the Arizona Legislature amended the program statute and enacted a new chapter of the Arizona tax code

that comprehensively regulates the STOs that award the program's scholarships. The revised state law heavily involves the state Department of Revenue in the administration of the program, and makes clear, as respondents allege in their complaint, that the program is not in any respect a program of private charitable giving. Some of the statutory revisions have already gone into effect; the remainder will go into effect on January 1, 2011. The changes were not brought to the Court's attention prior to its grant of certiorari.

Petitioners' briefs on the merits, as well as the briefs of their *amici*, pay little or no attention to the changes in Arizona law. Indeed, some of these briefs base their contention that the program is a private charitable program on a statutory provision that has been changed to say that the STOs that award the program scholarships are *not* charitable organizations. Since respondents seek only prospective relief this Statement, and the Argument that follows, are based on the current Arizona statute.

1. Arizona's Program

In the Ohio school-voucher program upheld by the Court in *Zelman v. Simmons Harris*, 536 U.S. 639 (2002), school vouchers were awarded by the state, on the basis of family income, to the parents of poor inner city children attending public schools in a failed public-school district. The vouchers were in an

amount intended to permit the parents receiving them to transfer their children to a non-public school, or to an out of district public school. The vouchers were funded through legislative appropriations of money from the state treasury. The program statute, like the Arizona statute in this case, was religiously neutral on its face. Despite that facial religious neutrality, however, had *Zelman*'s vouchers been awarded according to the religious preferences of the state officials who awarded them, or had they been awarded on the condition that students attend religious schools in order to receive them, the *Zelman* Court would undoubtedly have held that the *Zelman* program, though constitutional on its face, violated the Establishment Clause as applied.

In Arizona, program scholarships are awarded by "school tuition organizations" (STOs) acting on behalf of the state, that are established solely for the purposes of the state program, that are certified and closely supervised by the Department of Revenue, and that are financed entirely by state income-tax revenues. The STOs that award most of the program's scholarships are religious organizations that award scholarships on the basis of religion. The questions before the Court are whether the program violates the Establishment Clause, and whether respondent taxpayers have standing to make that claim in federal court.

As defined by the current program statute, STOs are non-profit organizations "established to receive contributions from taxpayers for the purposes of

income tax credits" under the program. A.R.S. § 43-1603(A).[1] In order to serve as an STO, an organization must first "apply to the department of revenue for certification as a school tuition organization," on a form "prescribed and furnished on request by the department." *Id.* at § 1602(A). The organization must show that it was "established to receive contributions from taxpayers for the purposes of" the program, and that it "meets the requirements prescribed by" the new chapter of the Arizona tax code that the legislature has recently enacted to regulate STOs. *Id.* at §§ 1603(A), 1602(A). The Department of Revenue must maintain and post on its website "a public registry of currently certified school tuition organizations." *Id.* at § 1602(B). In 2009, there were 53 STOs, including intervenor-petitioner Arizona Christian School Tuition Organization (ACSTO) and intervenor-respondent Arizona School Choice Trust (ASCT). State Br. App. 18 *et seq.*[2] If these organizations wish to continue to serve as Arizona STOs, they must apply for and receive certification from the Department of Revenue in order to be able to do so. A.R.S. § 43-1602(A).

[1] A.R.S. §§ 43-1691 *et seq.* contain the new Arizona legislation comprehensively regulating STOs. These provisions are reproduced at App. 1 – App. 17 of petitioner Garriott's brief on the merits. The brief incorrectly identifies the provisions as A.R.S. §§ 43-*1501 et seq.*

[2] "State Br." citations are to petitioner Garriott's brief on the merits.

Arizona STOs award scholarships from revenues they receive from what the program statute describes as taxpayer "voluntary cash contributions." A.R.S. § 43-1089(A). The statute fixes the maximum annual amount of those "contributions" at $1,000 for a married couple filing a joint return, and $500 for an individual taxpayer, A.R.S. § 43-1089(A), with an annual upward adjustment based on the metropolitan Phoenix consumer price index. *Id.* at § 43-1089(C). Downward adjustments are not permitted. *Id.*

These so-called "contributions," however, are simply tax payments. The taxpayers who make them receive a 100%, dollar-for-dollar, credit for the amount of the payment against their state income-tax liability. The payments cost the taxpayers who make them nothing. They are "voluntary" only in the sense that taxpayers can choose to pay some of their annual state income-tax obligation to a state-certified STO, rather than to the Department of Revenue. Taxpayers are not entitled to keep any portion of these "contributions," or to do anything with them except to pay their taxes. That the payment to an STO is a tax payment, not private charity, is underscored by the fact that the payment may be made at the same time that the taxpayer files his or her tax return for the year. For example, if a couple's tax return, when filed on April 15 after the end of the tax year, shows that the couple owes the state $1,500 in additional income taxes for the year, they may simply write two checks instead of one – a $1000 check to an STO, and a $500 check to the Department of Revenue.

The 100% credits that the statute gives to taxpayers for payments to an STO are different in kind from deductions for charitable contributions that taxpayers may claim under federal and state tax codes. To take a deduction for a charitable contribution, a taxpayer must make a payment of his or her own money -- money that the taxpayer would be entitled to keep if no contribution were made -- and the payment must be made during the tax year for which the deduction is claimed. The tax deduction serves to subsidize the taxpayer's contribution to some extent, but the taxpayer in all cases makes a substantial contribution of his or her own funds. The payment to an STO for which an Arizona taxpayer may claim a credit, by contrast, is made entirely with money the taxpayer has no right to keep.

An Arizona STO may do only one thing with the tax revenues it receives from taxpayers. It "[m]ust allocate at least ninety per cent of its annual revenue for [the program's] educational scholarships or tuition grants," and use the rest to pay salaries and other administrative expenses. A.R.S. § 43-1603(B)(1). STOs may not use this money for any other purpose. All of the scholarship money that an STO awards, all of the salaries paid to the STO's officers and employees, and all of the other costs of the STO's administration, are paid for by state income-tax revenues.

Certified STOs must abide by an extensive set of state regulations. These now include the following:

- Each STO must file an annual report with the Department of Revenue stating the amount of tax revenue received from taxpayers that year, the number of taxpayers that paid that revenue to the STO, the number and amount of the scholarships awarded by the STO that year, the schools those scholarship recipients attend, and the dollar amount of scholarships awarded to the students at each of those schools. A.R.S. § 43-1604.

- Each STO must "consider the financial need of applicants" in making scholarship awards, and report each year the amount of scholarships awarded to students whose family incomes make them eligible for the federal school lunch program, and the dollar amount awarded to students whose family incomes are greater than the school-lunch-program eligibility amount, but not more than 185% of that amount. A.R.S. §§ 43-1603(D)(2), 43-1604(7).

- Each STO must annually report the "names, job titles and annual salaries of the three employees who receive the highest annual salaries from the school tuition organization." A.R.S. § 43-1604(9).

- STOs may not award scholarships "solely on the basis of donor recommendations," and must not permit "the exchange of beneficiary student designations in violation of [A.R.S.] § 43-1089, subsection F." A.R.S. § 43-1603(B)

(3)-(4). The text of a statutorily prescribed Notice of these prohibitions must be posted on the STO's website. A.R.S. § 43-1603(C).

- Each STO must arrange for an annual audit or financial review (depending upon the amount of revenue received) of its finances. The audit or review must be conducted by "an independent certified public accountant licensed in this state" "in accordance with generally accepted auditing standards" or "standards for accounting and review services." The audit or review "must evaluate the organization's compliance with the fiscal requirements of this article." Signed copies of the annual audits or reviews must be submitted to the Department of Revenue within five days of their receipt by the STO. A.R.S. § 43-1605.

These rules are mandatory – not advisory; in addition to initially certifying STOs, the Department of Revenue is required to monitor STO compliance with them. The Department "shall send written notice by certified mail to a school tuition organization if the department determines that the [STO] has engaged in" any prohibited activity or practice. A.R.S. § 43-1602(C). STOs have "ninety days to correct the violation." *Id.* at § 43-1602(D). If an STO fails to comply within that period, the Department may withdraw the STO's certification, terminating its existence, and require it to refund donations. *Id.* If terminated, an STO may request administrative

review, and the administrative decision is subject to judicial review. *Id.* at § 43-1602(E).

Many of these new statutory regulations address abuses that had been uncovered in the administration of the Arizona program. The requirement that STOs take financial need into account in awarding scholarships addresses the fact that, although the Arizona program was purportedly enacted to give low-income families the opportunity to send their children to non-public schools, only a small percentage of the program's scholarships were actually being used by children transferring from public to non-public schools; the large majority were being awarded to children already in private or religious school. *See* Carrie Lips Lukas, *The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students*, Goldwater Institute Policy Report No. 186 (Dec. 11, 2003) 1, 7-10, reproduced in the J.A. 27-82.

The statutory prohibitions placed on awarding scholarships solely on the basis of taxpayer recommendations, and on taxpayers exchanging student beneficiary designations, address the practice of scholarship "swapping." The Arizona statute has always prohibited a taxpayer from "designat[ing] the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer." A.R.S. § 43-1089(E). Affluent families with children in private or religious schools realized that they could circumvent this prohibition, and lower their tuition costs, by joining with other families to "swap" "contributions." Each family would make a

cost-free $1,000 payment to an STO, designating the other family's child to receive a scholarship of that amount. *See Schooling Tax Credit Scrutiny Often Lags*, The Arizona Republic, Phoenix, Ariz., Sept. 21, 2009, 2009 WLNR 18586189; Pat Kossan and Ronald J. Hansen, *Tuition Aid Continues to Elude the Needy*, *Id.* Dec. 13, 2009, http://www.azcentral.com/news/articles/2009/12/13/20091213sto-outreach1213.html.

The requirement that STO salaries be reported annually addresses media reports that officers of large STOs, including petitioner ACSTO, were withholding up to 10% of the tax revenues they receive in order to pay themselves, family members, and friends exorbitant salaries. *See* Ryan Gabrielson and Michelle Reese, *Private School Credits Rife with Abuse*, The Tribune, Mesa, Ariz., Aug. 2, 2009, 2009 WLNR 14919217. For example, petitioner ACSTO's federal tax return Form 990 for 2009 shows that it had $10.8 million in revenue for that year. It paid its executive director, who is a member of the state legislature and its only paid employee, a salary of $96,000, paid a corporation that he controls more than $390,000 as an "affiliate," and paid more than $200,000 in "office expenses." http://www2.guidestar.org/organizations/86-0931047/east-valley-christian-school-tuition-organization.aspx. In substantially revising the program, the legislature chose to ignore the fact that religious STOs were using the program to distribute state tax revenues on the basis of their religious preferences, and on the condition that parents send their children to designated religious schools in order to receive scholarships.

2. Religious STO's Use of the Arizona Program to Support Religious Education

It was not evident from the text of the original Arizona statute that STOs would be able use state tax revenues to award scholarships that require children to attend religious schools; the language of one statutory provision seemed to preclude that practice. STOs were originally defined as organizations that provide "educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice." A.R.S. § 43-1089(G)(3) (1997). (That language now appears in A.R.S. § 43-1603(A).) The next sentence of that provision, however, said that, "to qualify as a school tuition organization, the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school." (Similar language now appears in A.R.S. § 43-1603(B)(2).) Whether because of this latter provision or for some other reason, the Department of Revenue has, from the inception of the program, permitted religious STOs to choose scholarship recipients on the basis of religion and/or to award scholarships on the condition that students attend religious schools.

Religious organizations in Arizona take full advantage of the opportunity Arizona thus gives them to use the tax-credit program to turn state income-tax revenues into religious-school scholarships. In 1998, the first calendar year of the program's operation, there were 16 Arizona STOs. The largest was *amicus*

Catholic Tuition Organization of the Diocese of Phoenix, which awarded scholarships usable only at Diocese schools; the second largest was petitioner Arizona Christian School Tuition Organization, which awarded scholarships usable only at Christian schools; and the third largest was the Brophy Community Foundation, which made scholarship awards only to students at two Phoenix single-sex religious secondary schools. Compl. ¶¶ 11-19. These three STOs were the recipients of 85% of the tax-credited payments made to STOs during 1998. *Id.*

The size of the Arizona program has greatly increased since the complaint in this case was filed in 2000. In 2009, there were 53 STOs that collected more than $50 million in tax revenue from taxpayers. State Br. App. 18. The two largest were petitioner ACSTO and *amicus* Catholic Tuition Organization of the Diocese of Phoenix, which collected more than $10 million and more than $9 million respectively. The fifth largest was *amicus* Catholic Tuition Organization for the Diocese of Tucson, and the sixth largest was *amicus* Jewish Tuition Organization. *Id.* at App. 30. These four religious STOs received more than half of the more than $50 million in tax payments received by all Arizona STOs in 2009. That money will be used to distribute government scholarship aid to children who are chosen by the STOs on the basis of their religion and/or on the condition that they attend a religious school. If required by the school, moreover, these scholarship students must participate in all the religious activities of the religious school they attend.

Arizona's religious STOs do not hide their practice of using Arizona income taxes to provide revenue for their religious educational programs. They advertise the practice. Their websites, for example, explain that the tax-credit statute was designed to benefit religious education and to tell parishioners and others that they can use the tax-credit program for that purpose, at no cost to themselves. The website of intervenor-petitioner Arizona Christian School Tuition Organization, for example, describes ACSTO's goal as being "to further Christian education *by effectively implementing the provisions of* [A.R.S. § 43-1089] *for the benefit of Christian school students and their families*." ACSTO Home Page, http//acto.org (last visited Sept. 11, 2010) (emphasis added). The website urges taxpayers "looking for new ways to support Christian education" to do so by "*taking advantage of Arizona's unique opportunity to receive a dollar-for-dollar credit against their Arizona state income tax*." *Id.* (emphasis added). The website of the Jewish Federation of Greater Phoenix (JFGP), explains that, "*[w]ith Arizona's scholarship tax credit, you can send children to our community's Jewish day schools and it won't cost you a dime!*"[3] JFGP Ways to

[3] JTO's *amicus* brief in support of certiorari made exactly the opposite assertion. It contended that the court of appeals below "*erred* in suggesting that '[a] tax-credit eligible contribution to an STO costs the taxpayer nothing.'" Brief for Jewish Tuition Organization et al. as Amicus Curiae in Support of Petitioners, Nos. 09-987, 09-988, 09-991 (Mar. 24, 2009) 12, n.7 (emphasis added).

Give, Jewish Tuition Organization, http://phoenix.ujcfedweb.org/page.aspx?ID=53899 (last visited Sept. 11, 2010) (emphasis added). The Chabad Tuition Org. (CTO) website asks taxpayers to "imagine giving *Tzedakah [charity] with someone else's money*. . . . Stop Imagining, *thanks to Arizona tax laws you can*!" CTO Donation Page, http://www.chabadaz.com/templates/articlecco_cdo/aid/105378/jewish/Arizona School-Tax-Credit.htm (last visited Sept. 11, 2010) (emphasis added). The websites and mailings of most of the other Arizona religious STOs make identical or similar assertions that the Arizona program can be used so that "someone else" – other Arizona taxpayers – will be taxed to pay for the religious education promoted by the STO. *See, e.g.*, Christian Scholarship Foundation Page, http://www.pcssf.org (last visited Sept. 11, 2010) ("Would you like to participate in a win-win-win situation? Christian Scholarship Foundation can put you in that situation! You win because *you can take a direct tax credit . . . off your Arizona income taxes by diverting that money* to CSF.") (emphasis added).

3. Proceedings Below

The complaint in this case was filed in February, 2000. It named the then-Director of the Arizona Department of Revenue as defendant. Respondents alleged that they were Arizona taxpayers and that the Arizona program was diverting state income tax revenues from the state's general fund in violation of the Establishment Clause. The Director, represented

by Arizona's Attorney General, did not question respondents' standing to sue, but moved to dismiss on the basis of the federal Tax Injunction Act and principles of federal-state comity. The district court granted the motion. *Winn v. Hibbs*, 361 F.Supp. 2d 1117 (D. Ariz. 2005). The court of appeals reversed and remanded, and this Court affirmed. *Hibbs v. Winn*, 542 U.S. 88 (2004). Justice Kennedy's dissenting opinion for four members of the Court contended that the Tax Injunction Act precluded federal jurisdiction in this case. Neither that opinion, however, nor Justice Ginsberg's opinion for the Court, expressed doubt regarding respondents' standing to invoke federal jurisdiction. The state continued not to question respondents' standing, and the United States, which participated in this Court as *amicus* supporting the state, did not suggest any doubt about respondents' standing in either its brief or its oral argument.

On remand, the district court granted motions by petitioner ACSTO and respondent ASCT to intervene as defendants. *Winn*, 361 F.Supp. 2d at 1117. It then granted ASCT's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. *Id.* Unlike the state, the intervenors challenged respondents' standing. The district court assumed, however, "that Plaintiffs have standing."[4]

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[4] The district court also assumed that "the case is not barred by *res judicata*." *Winn*, 361 F.Supp. 2d at 1119. The *res judicata* defense was based on the fact that the Arizona Supreme Court had upheld the facial validity of the Arizona statute shortly after its enactment. *See Kotterman v. Killian*, 193 Ariz. 273 (1999). In *Hibbs*, however, the Court explained

(Continued on following page)

Id. at 1119. The district court's decision to dismiss was based on its description of the Arizona program as one in which STOs use taxpayers' "voluntary cash contributions to provide scholarships and tuition grants." *Id.* at 1118. The court explained that it believed that taxpayers using the Arizona tax credit "exercise a choice in how *their money* . . . is spent." *Id.* at 1121 (emphasis added). Respondents' complaint, in the court's view, did not "implicate the Establishment Clause" because taxpayers and STOs make "private choices" about how to use that money. *Id.* at 1122.

The court of appeals reversed. *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (9th Cir. 2009). In the court of appeals, the state continued to take the position "that respondents do have standing to make their challenge under this Court's precedents." Joint Motion of Petitioner Gale Garriott and the United States for Divided Argument p. 4, filed on Sept. 9, 2010. The contention that respondents lack standing was, however, pressed by the two intervening STOs. *Winn*, 562 F.3d at 1007. The court of appeals rejected that contention because respondents "have alleged that the state has used its taxing and spending power to advance religion in violation of the Establishment Clause." *Id.* at 1008. The court relied on this Court's decisions in *Flast v. Cohen*, 392 U.S. 83 (1968), *Bowen v. Kendrick*, 487

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that "*Kotterman*, it is undisputed, has no preclusive effect on the instant *as-applied* challenge to § 43-1089 brought by different plaintiffs." *Hibbs*, 542 U.S. at 95 (emphasis added).

U.S. 589 (1988), and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), which had recognized "'a narrow exception to the general constitutional prohibition against taxpayer standing.'" *Id.* (quoting *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 602 (2007), discussing *Flast*, 392 U.S. at 102-103). The challenge to the Arizona program fell within that exception because Arizona's tax credit, "a powerful legislative device for directing money," constituted a use of Arizona's taxing and spending power. *Id.* at 1009.

The court rejected the argument that the *Flast* exception was inapplicable because the tax revenue used for scholarships in the Arizona program "does not pass through the state treasury." *Id.* It explained that, because tax credits reduce the revenues entering the treasury, they constitute "'a charge made upon the state'" *id.* at 1009 (quoting *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 791 (1973)) – a "'form of [state] subsidy that is administered through the tax system.'" *Id.* at 1009 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting)). If taxpayer standing were to depend on whether state funds were diverted *before* reaching the treasury, rather than spent *after* entering the treasury, the law would be making an "artificial distinction [ ]." *Winn*, 562 F.2d at 1009.

The fact that the religiously discriminatory decisions that were the basis of respondents' Establishment Clause claim were decisions made by Arizona

taxpayers making payments to STOs and by the STOs that receive the payments, rather than by the state legislature, also did not defeat respondents' standing. *Id.* at 1010. The court explained that *Bowen*, for example, had held that "taxpayers have standing to challenge a legislature's exercise of its taxing and spending power *even when the legislature does not use that power to directly fund religious organizations, but instead uses the power to authorize third parties to fund such organizations.*" *Id.* (emphasis added). Recognition of taxpayer standing in this case was also consistent with the fact that this Court "has repeatedly decided Establishment Clause challenges brought by state taxpayers against state tax credit, tax deduction and tax exemption policies, without ever suggesting that such taxpayers lacked Article III standing." *Id.*

On the Establishment Clause merits, the court considered both the purpose and effect of the Arizona program. With regard to purpose, it was significant that, although the Arizona program statute could have been interpreted to require STOs to distribute scholarships without reference to religion, "in practice, STOs are permitted to restrict the use of their scholarships to use at certain religious schools." *Id.* at 1012. If that allegation were proved, it "could belie defendants' claim that Section 1089 was enacted primarily" for a secular purpose. *Id.* With regard to the effect of the Arizona program, the court explained that respondents allege that many of Arizona's STOs are religious organizations that "exist to promote the

funding of religious education." *Id.* at 1013. Taxpayers had "channel[ed] a disproportionate amount of government aid to [these] STOs, which in turn limit their scholarships to use at religious schools." *Id.* If respondents' allegations were true, "a reasonable observer could . . . conclude that the aid reaching religious schools under this program 'carries with it the *imprimatur* of government endorsement.'" *Id.* at 1013-1014 (quoting *Zelman*, 536 U.S. at 655). The court held that respondents should be given the opportunity, on remand, to prove the truth of their allegations. *See id.* at 1007.

The court of appeals specifically addressed the contentions, made here by ACSTO and its *amici*, that the Establishment Clause is not violated by the Arizona program because STOs are "no different from other nonprofit, religious institutions that are funded through tax-deductible contributions;" and because "'government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.'" *Winn*, 562 F.2d at 1014 (quoting *Zelman*, 536 U.S. at 649). The first of these contentions was incorrect because Arizona's STO scholarships did not involve "donations of individual wealth" and were not examples of "charitable giving." *Id.* at 1015. With regard to the contention that the Arizona program was valid because it was a program of numerous private choices, the court of appeals explained that the constitutionally relevant private choice was the private choice of *parents* who receive vouchers *"on neutral terms, with no reference to*

religion," not the choices of the taxpayers that "contribute" to STOs and of the STOs that use those contributions to award program scholarships. *Id.* at 1017 (quoting *Zelman*, 536 U.S. at 653) (emphasis in original).

There were eight dissents from the denial of petitions for rehearing en banc. *Winn v. Arizona Christian School Tuition Organization*, 586 F.3d 649 (9th Cir. 2009). Judge O'Scannlain's opinion for the dissenters did not question respondents' standing to sue. In disagreeing with the panel's conclusion that respondents' complaint stated an Establishment Clause claim, the dissent relied on its characterization of the Arizona program as one in which "individuals voluntarily . . . contribute money" to STOs and in which "the state's involvement stops with authorizing the creation of STOs and making tax credits available" so that the program is thereafter "utterly out of the state's hands." *Id.* at 659, 660, 662. As we have explained in describing the revised structure of the Arizona program, that characterization, if arguably correct at the time it was made, is no longer even remotely plausible. On the basis of that characterization, however, the dissent concluded that the Establishment Clause was not violated because the Arizona program "in no way induces, encourages, or promotes private parties to aid religion." *Id.* at 669.

The court of appeals panel filed an opinion concurring in the Circuit's decision not to rehear the case en banc. It explained that the dissent "fails to address the crucial difference between the Ohio voucher

program upheld in *Zelman* and the Arizona Department of Revenue's application of Section 1089." *Id.* at 651. *Zelman* established that, in order to comply with the Establishment Clause, a voucher program must be "one that grants *access* to benefits without regard to religion." *Id.* at 652 (emphasis in original). The Arizona program, by contrast, "neither makes scholarships available to parents on a religiously neutral basis nor gives them a true private choice as to where to utilize the scholarships." *Winn*, 586 F.3d at 658.

SUMMARY OF ARGUMENT

The Arizona tuition tax-credit program challenged by respondents in this case is a government spending program, not a program of private charity. The taxpayers who make payments to STOs receive a 100%, dollar-for-dollar, credit for the full amount of those payments toward satisfaction of their state income-tax obligation. They do not engage in charity because the payments cost them nothing. The program's scholarships are funded entirely by state income-tax revenues, the scholarships are all awarded by organizations established solely for that purpose, the costs and expenses of those organizations are entirely paid with state funds, the organizations must be certified by the state Department of Revenue in order to participate in the program, and the Department is required to monitor the finances and activities of the organizations to ensure that they comply with the state's extensive regulations, and

may terminate the existence of the organizations if they do not follow those rules. The financial impact of the program on the state fisc, and therefore on the state's taxpayers, is equivalent in every relevant way to the fiscal impact of a program funded through direct legislative appropriations. Petitioners' arguments that respondents do not have standing to sue, and that the program complies with the Establishment Clause, are based on their mischaracterization of the program as a program of private charity.

Once the character of the Arizona program as a government spending program is understood, it is clear both that respondents have standing as taxpayers to challenge it, and that the program violates the Establishment Clause. In *Flast v. Cohen*, 392 U.S. 83 (1968), this Court recognized a narrow exception to the general doctrine that federal and state taxpayers do not have standing in federal court to challenge the constitutionality of state or federal governmental spending programs. *Flast* holds that taxpayers have standing when they claim that legislatively-authorized government spending programs violate the Establishment Clause. Since *Flast*, this exception has been applied to taxpayer Establishment Clause challenges to "tax expenditure" programs – programs of tax deductions, tax credits, tax exclusions or tax exemptions – as well as to Establishment Clause challenges to direct legislative appropriations.

The Court has adjudicated several important tax-expenditure cases since *Flast* was decided, including its decision in this case four years ago. It has done so

without any doubt being expressed by the Court, by any member of the Court, by any of the state or federal litigants involved in these cases, or by their *amici*, that the taxpayer plaintiffs in the case lacked standing. Litigators and lower federal courts have repeatedly relied on this course of decisions in adjudicating the constitutional merits of state tax-expenditure programs in suits brought by state taxpayers. In the last four years, the Court has twice reaffirmed the *Flast* exception and defined the exception in language that shows that it is applicable to the present case. Respondents do not ask the Court to expand the *Flast* exception in any respect. Petitioners and their *amici*, by contrast, ask the Court to overturn forty years of consistent taxpayer-standing practice in the lower federal courts. No recent change in factual or jurisprudential circumstances – or constitutional doctrine – justifies taking that radical step.

The Arizona program violates the Establishment Clause. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court, in upholding an Ohio school-voucher plan, permitted states to spend state funds to pay for religious elementary or secondary school education. It did so because the state financial aid program in that case was supported by extremely strong educational needs, because the program awarded the aid to parents on a completely religiously-neutral basis, and because it gave parents receiving vouchers complete freedom to use them at the school of their choice. The Arizona program does not

satisfy any of these three criteria. It is not supported by any strong educational need; it lacks religious neutrality because the majority of its state-funded scholarships are awarded by religious organizations that decide which children will receive scholarships, and in what amount, on the basis of the child's religion; and it does not offer parents free choice because most of its scholarships require parents to enroll their children at a religious school in order to receive a scholarship.

Zelman's requirement that state scholarship aid be awarded to parents and children on a religiously neutral basis is an example of a broader constitutional rule that prohibits state or federal government benefits from being distributed or disbursed to the beneficiaries of governmental benefit programs on the basis of religion, race, or any other form of discrimination which the government is prohibited from practicing. The beneficiaries of the Arizona program are Arizona parents and children – not the taxpayers who pay their taxes to STOs or the STOs that award scholarships from those payments. The fact that "contributing" taxpayers and STOs exercise free choice in Arizona regarding which parents will receive scholarships does not satisfy the constitutional requirement that the program's beneficiaries have access to state-funded scholarships on a religiously neutral basis. Under the Arizona program, parents may be denied state scholarship aid because of their religion, or because they refuse to send their child to a religious school. The Establishment Clause does not

permit government benefits to be restricted in that manner.

ARGUMENT

I. THE ARIZONA TAX-CREDIT PROGRAM IS A GOVERNMENT SPENDING PROGRAM, FUNDED ENTIRELY BY GOVERNMENT REVENUES AND ADMINISTERED BY ORGANIZATIONS ACTING ON THE STATE'S BEHALF THAT ARE CERTIFIED AND CLOSELY SUPERVISED BY THE STATE DEPARTMENT OF REVENUE. IT IS NOT A PROGRAM OF PRIVATE CHARITY.

Whether respondent taxpayers have standing to sue in this case and whether, if they do, they have stated a claim that the Arizona program violates the Establishment Clause, depends upon whether the program is considered to be a program of private charity, or a government spending program. Petitioners and their *amici* assert that the program is a program of private charity – a program in which Arizona taxpayers voluntarily contribute money (for which they get an ordinary tax benefit) to charitable organizations, some of which are religious, that use the money to award scholarships to deserving students. As *amicus* United States understands the program, for example, it is one that "merely provides a beneficial tax consequence for private citizens who donate their own funds to STOs of their own choosing." Brief for United States as Amicus Curiae

Supporting Petitioners Nos. 09-987, 09-991 (Aug. 6, 2010) ("U.S. Br."). Petitioner ACSTO describes the program as one in which "state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals." ACSTO Br. 8. Arizona's Attorney General likens the program to "other tax credit and deduction programs that allow taxpayers to choose to contribute to religious organizations." State Br. 2. Respondent ASCT, supporting petitioners, describes the program as one containing "multiple layers of true private choice" that "merely encourages taxpayers to donate to privately created charities in order to benefit other people's children." ASCT Br. 8-9.

If those were accurate descriptions of the Arizona program, the Establishment Clause would have no bearing on this case, and respondents could not invoke federal jurisdiction to claim that it did. One would wonder what the court of appeals panel could possibly have had in mind in reversing the dismissal of respondents' complaint.

The Arizona tax-credit program, however, is clearly not a program of private charity. It is a government spending program that distributes state tax revenues in order to serve the state's purpose of enhancing school-choice opportunities for Arizona parents. To the outside observer, the program may *look* like private charity. Taxpayers write checks to organizations with charitable-sounding names that use the money to give scholarships to children. Charity, however, involves giving something of *your own*, at

some cost to yourself, for a charitable purpose. That does not happen under the Arizona program. When taxpayers write checks to STOs, they are not donating their "own funds;" they are paying their state income taxes. Their choice to pay that money is not voluntary. A check for the amount due in taxes must be written either to the Department of Revenue or to an STO. The program is not funded by private money; it is entirely funded by state income-tax revenues. As religious STOs repeatedly explain on their websites, taxpayers who write checks to religious STOs support religious education "with other people's money," not their own. STOs are not charities. They disburse no private contributions or money of their own. They serve one purpose, and one purpose only – to receive and disburse state income-tax revenues to further the state's policy of promoting parental school-choice.

The Arizona program is a legislatively established state spending program. It is an extremely unusual state spending program, in which the state gives some of its citizens the power to spend the state's tax revenue to further the religious purposes of themselves and of the STOs to which they pay their taxes. But it is nevertheless a state spending program that must comply with the Establishment Clause.

A. Taxpayers Who Make "Voluntary Contributions" to STOs Are, in Reality, Paying Taxes that They Owe to the State. They Contribute None of Their Own Funds to the Scholarship Program.

When originally enacted, it was possible to contend that taxpayers who made payments to STOs contributed at least some of their "own funds" to the program. At that time, taxpayers received a tax credit for their payments to STOs only if the payment were made "during the taxable year." A.R.S. § 43-1089(A). Taxpayers therefore had to make a payment of their own funds to an STO by the end of a tax year, and would be reimbursed later, when filing their tax return for that year. Arguably therefore, the taxpayer lost the benefit of the interest that the taxpayer otherwise might have earned on that money in the interim.

It is no longer plausible, however, if it ever was, to say that taxpayers make payments to STOs with their own money. Arizona legislation now provides that, if a payment is made to an STO "on or before the fifteenth day of the fourth month following the close of the taxable year" – by April 15 of the next year in most cases – that payment is "considered to have been made on the last day of that taxable year." *See* A.R.S. § 43-1089(G), State Br. App. 3. A taxpayer thus need never spend a penny of anything that can possibly be described as his or her "own funds" to make a voluntary "cash contribution" to an STO. Unless one believes that tax payments to the IRS are

voluntary "donations" of one's own funds, it cannot seriously be contended that taxpayer payments to STOs are payments by taxpayers who "donate their own funds to STOs of their own choosing." They donate *the state's funds* to STOs of their own choosing.

B. STOs Are Creatures of the State, Established to Administer a State Spending Program on the State's Behalf, and Supervised by the State to Make Sure They Do So.

The original version of the Arizona statute defined STOs as "*charitable organization*[*s*]." A.R.S. § 43-1089 (G)(3) (emphasis added). Arizona law, however, now defines STOs as "*nonprofit organization*[*s*]." A.R.S. § 43-1602(A) (emphasis added), reproduced at State Br. App. 5. The new definition of an STO is accurate; the prior definition was, at best, seriously misleading. Arizona's STOs are organizations established solely to serve a state function. They must be certified by the state to distribute state-funded benefits for the state's purposes according to state rules under the state's close supervision. That is all that they do. Everything the STOs do is paid for by state income-tax revenues.

C. The Arizona Program Has the Same Fiscal Impact on Arizona Taxpayers as Do Direct Legislative Appropriations of Funds.

Petitioner ACSTO rests its conclusion that respondents lack standing as taxpayers on the proposition that "[r]espondents do not allege . . . that the State has extracted and spent their tax dollars under this program." ACSTO Br. 2. The Arizona program, however, may be cost free for the taxpayers who contribute to it, and cost free as well for the STOs that disburse scholarships, but it is definitely not cost free for the state's other taxpayers. The program currently costs them more than $50 million a year. We can cite no better authority for that conclusion than petitioner Arizona Department of Revenue's official explanation of the effect of the tuition tax credit on the state's fisc. The Department is required by law each year to

> "issue a written report to the governor and legislature detailing the approximate costs in lost revenue for all state tax expenditures in effect at the time of the report. For the purpose of this paragraph, *'tax expenditure' means any tax provision in state law which exempts, in whole or in part, any persons, income, goods, services or property from the impact of established taxes including* deductions, subtractions, exclusions, exemptions, allowances and *credits*."

A.R.S. § 42-1005(A)(4) (emphasis added).

The Department's Report for 2009 explains the effect of tax credits on Arizona's finances as follows:

> Tax expenditures are provisions within the law (exemptions, exclusions, deductions *and credits*) designed to encourage certain kinds of activity or to aid taxpayers in certain categories. Such provisions, when enacted into law, result in a *loss of tax revenues*, thereby reducing the amount of revenues available for state (as well as local) programs. In effect, the *fiscal impact of implementing a tax expenditure would be similar to a direct expenditure of state funds*. This report provides a list of tax expenditures, plus, whenever possible, details the approximate costs of exempting certain types of income, goods, services or property from their respective tax statutes.

The Revenue Impact of Arizona's Tax Expenditures Fiscal Year 2008/09 at 1, *available at* http://www.azdor.gov/reports/research/taxexpenditures.aspx (emphasis added).

The Department's Report goes on to explain that "[a] tax credit differs from an exemption, subtraction or deduction in that it directly reduces tax liability, not taxable income. A $100 deduction, for example, would reduce tax liability by, at most, $4.54 ($100 times the maximum tax rate of 4.54%). On the other hand a $100 credit reduces tax liability by the full $100." *Id.* at 45. The 2009 Report contains a chart listing the number of claimants of each Arizona tax credit that year, and the amount of the expenditure

of state funds caused by each credit that year. The chart in the 2009 Report states that 76,065 taxpayers claimed the "private school tuition organization credit," causing the expenditure of $54.30 million of state funds. *Id.* at 48.

II. RESPONDENTS HAVE STANDING TO SUE.

A. For Forty Years, the Court Has Consistently Allowed State Taxpayers to Bring Establishment Clause Challenges to State Tax-Expenditure Programs.

This is not the first time this case has been before the Court. Six years ago, in *Hibbs v. Winn*, 542 U.S. 88 (2004), the Court rejected the state's claim that there was no federal jurisdiction in this case. In *Hibbs*, the issue was whether respondents' suit was barred by the federal Tax Injunction Act, 28 U.S.C. § 1341. It is clear from the text of that Act that it precludes state taxpayers from suing in federal court to claim that a state tax levied on *them* is unconstitutional (unless there is no adequate remedy at state law). The question in *Hibbs* was whether the Act also barred federal jurisdiction in a case where state taxpayers – the respondents in this case – claim that tax credits, deductions or exemptions given to *other* taxpayers are unconstitutional. The Court held, five to four, that federal jurisdiction could be invoked in such cases. Four members of the Court believed that the Act was a jurisdictional bar.

Both the Tax Injunction Act jurisdictional objection raised by the state in this case in *Hibbs*, and the lack of standing objection now asserted by ACSTO, concern the ability of "third-party" state taxpayers to challenge the constitutionality of a state's tax treatment of other taxpayers. In *Hibbs*, the question was whether respondents' third-party status exempted them from the Tax Injunction Act's jurisdictional bar. ACSTO now argues that that same status deprives respondents of standing to sue. In light of the close relationship between the two jurisdictional questions, which are essentially mirror images of each other, one would have expected that either the state or the dissenters or *Hibbs* would have raised standing as an alternative basis for dismissing the case. Neither the state or the *Hibbs* dissenters, however, nor the United States, which participated in *Hibbs* as *amicus* supporting the state, mentioned the issue. Nor did the *Hibbs* majority. The failure of any Justice or litigant in *Hibbs* to question whether respondents have standing in this case cannot have been caused by the fact that they all were unaware that Article III contains a standing requirement. That failure, instead, was almost certainly due to the fact that it was clear to everyone involved in the case that state taxpayers have standing in cases like this one.

In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court held, as an exception to the general absence of taxpayer standing to challenge the constitutionality of federal spending programs, that federal taxpayers

had standing to bring an Establishment Clause challenge to the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a *et seq.*, 821 *et seq.* The gravamen of plaintiffs' complaint in *Flast* was that federal funds appropriated under the Act were financing religious educational programs at religious schools. The Act established a program of federal financial assistance to local educational agencies in order to support the education of the children of low-income families. It authorized federal payments to be "made to state educational agencies, which pass the payments on in the form of grants to local educational agencies." *Flast*, 392 U.S. at 86. The local agencies, in turn, were to provide educational aid to "private elementary and secondary schools." *Id.* (citations omitted). Plaintiffs' claim was based on their allegation that state and local educational agencies were using the Act to give financial aid to "religious and sectarian schools." *Id.* at 87.

The Court held that the taxpayer plaintiffs in *Flast* had standing because they could "demonstrate the necessary stake as taxpayers in the outcome of the litigation." *Id.* at 102. Standing existed because plaintiffs alleged the unconstitutionality of the exercise "of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution," rather than "an incidental expenditure of tax funds in the administration of an essentially regulatory statute," and because they further alleged that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of [that] power

and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Flast*, 392 U.S. at 102-103.

During the four decades between *Flast* and *Hibbs*, the Court decided several important Establishment Clause cases brought by federal and state taxpayer plaintiffs. Some of these involved, as had *Flast*, legislative spending via legislative appropriations. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Bowen v. Kendrick*, 487 U.S. 589 (1988). Others, however, involved, as does the present case, legislative spending through legislatively enacted tax expenditures, such as tax deduction, tax credit and tax exemption programs. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983) (tax deduction); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (tax deduction and credit); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (tax exemption). None of the parties in those cases, and none of the Court's opinions in them, questioned the taxpayer plaintiffs' standing. It seems relevant in this connection that Article III standing issues – including taxpayer standing issues – were a recurring and important feature of the Court's jurisprudence during this period. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *U.S. v. Richardson*, 418 U.S. 166 (1974).

The Court has addressed taxpayer standing twice since *Hibbs*. Neither of these decisions creates doubt about respondents' standing in this case. In

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006), the Court held that state taxpayers did not have standing to challenge a state franchise-tax credit as a violation of the Commerce Clause. The dispositive factor was that the taxpayer plaintiffs claimed a violation of the *Commerce Clause*, whereas "'only the Establishment Clause' has supported federal taxpayer suits since *Flast*." *DaimlerChrysler Corp.*, 547 U.S. at 347 (citations omitted). Chief Justice Roberts' opinion for a unanimous Court reaffirmed that, in Establishment Clause cases, "'we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing.'" *Id.* (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988)). *DaimlerChrysler* described the *Flast* exception as establishing that "'a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of' the Establishment Clause." *Id.* (quoting *Flast*, 392 U.S. at 105-106).[5]

The second post-*Hibbs* case was *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007). *Hein* was a federal-taxpayer Establishment Clause challenge to White House conferences that plaintiff taxpayers alleged were "designed to promote, and had the effect of promoting, religious community groups

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[5] *DaimlerChrysler* was a state taxpayer challenge, whereas *Flast* was brought by federal taxpayers. The *DaimlerChrysler* opinion explained that "'[w]e have likened state taxpayers to federal taxpayers' for purposes of taxpayer standing." *Id.* at 345.

over secular ones." *Hein*, 551 U.S. at 596. *Hein* held that these taxpayers did not have standing. In doing so, all but two members of the Court again adhered to *Flast*. Justices Scalia and Thomas concurred in the result on the ground that *Flast* should be overruled – the first time that any Justice had taken that position since *Flast*. *Id.* at 637. Justice Alito's plurality opinion, for himself, Chief Justice Roberts and Justice Kennedy rejected standing while stating that "[w]e do not extend *Flast*, but we also do not overrule it. *We leave Flast as we found it.*" *Id.* at 615 (emphasis added). *Hein*'s four dissenters believed that the *Flast* exception applied. Justice Kennedy's concurring opinion appeared to summarize the conclusion of the Court as a whole regarding the *Flast* exception: "[T]he result reached in *Flast* is correct and should not be called into question." *Id.* at 616.

In describing its understanding of the scope of the *Flast* exception, the *Hein* plurality stated, as had the unanimous Court in *DaimlerChrysler*, that the exception applies when a taxpayer plaintiff shows "'that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power.'" *Id.* at 602 (quoting *Flast*, 392 U.S. at 102-103). The plurality believed that the *Hein* plaintiffs did not satisfy that standard because they did "not challenge any specific congressional action or appropriation; nor [did] they ask the Court to invalidate any congressional . . . program as unconstitutional." *Id.* at 605. Their challenge was instead a challenge to "discretionary Executive Branch expenditures" that "were not expressly authorized or mandated by any specific

congressional enactment" and thus "not directed at an exercise of congressional power." *Hein*, 551 U.S. at 608.

B. The *Flast* Exception Applies to the Present Case.

Based on *DaimlerChrysler* and *Hein*, and more than forty years of consistent practice, it could hardly be clearer that respondents in this case have *Flast* standing under current law. Respondents allege, as *DaimlerChrysler* requires, that state "'[legislative] action under the [state's] taxing and spending [power] is in derogation of' the Establishment Clause," *DaimlerChrysler Corp.*, 547 U.S. at 347 (quoting *Flast*, 392 U.S. at 106), and, as the *Hein* plurality would require, "that the challenged enactment exceeds specific constitutional limitations imposed upon the [state or federal government's] taxing and spending power." *Hein*, 551 U.S. at 602 (quoting *Flast*, 392 U.S. at 102-103). Respondents rely on the Establishment Clause, as *DaimlerChrysler* requires, and they attack a legislative spending program, not a program of Executive expenditures, as *Hein* requires. With respect to taxpayer standing, standing in the present case is at least as clear as it was in *Mueller*, *Walz* and *Nyquist*. Standing is also present here on the authority of the Court's summary affirmance of *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514 (3rd Cir.), *aff'd*, 442 U.S. 907 (1979). Taxpayers there challenged a state tax statute that allowed a $1,000 deduction from gross income for each taxpayer's child attending an "elementary or secondary

institution not deriving its primary support from public moneys." *Id.* at 516 (citations omitted). The court of appeals held that "[t]he individual plaintiffs, as taxpayers, have standing under *Flast v. Cohen*." *Id.* This Court affirmed.

It seems to be conceded by ACSTO, the United States, and the other *amici* that support ACSTO on this issue, that if plaintiffs had standing in *Nyquist*, *Mueller* and *Byrne*, respondents have standing here. Those cases, like this one, were taxpayer Establishment Clause challenges to state statutory tax-expenditure programs in which state financial support for religion was not paid out of the state treasury, where the challenged state statutes were religiously neutral on their face, and where the decision to direct aid to religious uses was made by state taxpayers, not state officials – exactly the facts of the present case.

Neither petitioners nor their *amici* suggest any recent development in the law, or any recent change of jurisprudential or other circumstances, that would call for the reversal of forty years of unbroken practice that has been followed by lower courts as well as this Court. In addition to the decision below in this case, in which all the judges of the Ninth Circuit, including those who dissented from the denial of rehearing en banc, either held or assumed that respondents have standing, *see Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514 (3rd Cir. 1979); *Warren v. Commissioner*, 302 F.3d 1012 (9th Cir. 2002); *Johnson v. Economic Dev. Corp.*,

241 F.3d 501 (6th Cir. 2001); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985). Most recently *see Freedom From Religion Foundation, Inc. v. Geithner*, 2010 U.S. Dist. LEXIS 50413 (E.D.Cal. 2010), and the extensive discussion of that case in Michael L. Gompertz, *Lawsuit Challenges Income Tax Preferences for Clergy*, 128 Tax Notes 81 (July 5, 2010). So far as we are aware, there has there been no recent avalanche of frivolous or trivial taxpayer Establishment Clause taxpayer suits challenging tax expenditure programs, nor has there been any disruption of state tax processes indicating a need for the reexamination of a completely settled practice. To deny standing here would reject settled law and practice without any practical or principled need to do so.

Finally, it is also important to note that taxpayer standing in this case is supported by the Court's extensive discussion of taxpayer standing in *Bowen v. Kendrick*, 487 U.S. 589 (1988), which was a legislative appropriation, rather than a tax-expenditure, case. The facts in *Bowen*, and the language of Chief Justice Rehnquist's opinion for the Court there, bear directly on this case. As described by the plurality in *Hein*, *Bowen* "held that the taxpayer-plaintiffs had standing to mount an as-applied challenge to the Adolescent Family Life Act (AFLA), which authorized federal grants to private community service groups including religious organizations." *Hein*, 551 U.S. at 606. The determinative factor regarding taxpayer standing was that AFLA "was 'at heart a *program of disbursement*

of funds pursuant to Congress' taxing and spending powers,' and that the plaintiffs' claims 'call[ed] into question how the funds authorized by Congress [were] being disbursed *pursuant to the AFLA's statutory mandate*.'" *Id.* at 607 (quoting *Bowen*, 487 U.S. at 619-620) (first emphasis added). The Arizona program in this case, like the program in *Bowen*, is similarly "a program of disbursement of funds" pursuant to the Arizona legislature's use of its "taxing and spending powers," and respondents here also call into question "how the funds authorized by the legislature" are being "disbursed pursuant to" the Arizona program's "statutory mandate."

C. The Arguments of ACSTO and Its *Amici* That Respondents Lack *Flast* Standing Are Based On Incorrect Descriptions of the Arizona Program.

ACSTO's contention that respondents lack standing is based on its characterization of an Arizona STO as "a charitable organization in this state" that "[a]nyone can form," and its repeated assertion that the Arizona program involves "donations" or "contributions" of "private funds" to charity. ACSTO Br. 5. As we have explained, these statements about the Arizona program are all incorrect. ACSTO and some of its *amici* also rely heavily upon the fact that the Arizona statute here is religiously neutral on its face. In *Bowen*, where the funding statute was also religiously neutral on its face, the claim was made that the *Flast* exception was inapplicable because of that

statutory neutrality. The *Bowen* Court did not believe, however, that the fact that "appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power" than if the religious uses were evident on the face of the statute. *Bowen*, 487 U.S. at 619. As here, one of the challenges in *Bowen* was to the statute, as applied. That did not deprive the *Bowen* plaintiffs of standing because "AFLA is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers and appellees' claims call into question how the funds authorized by Congress *are being disbursed* pursuant to the AFLA's statutory mandate." *Id.* at 619-620 (emphasis added).

In opposing respondents' standing, ACSTO argues that respondents' claim that the Arizona program reduces the balance of the state's general fund is "purely speculative." ACSTO Br. 9. Whether the balance of the general fund is reduced, of course, is a question regarding which respondents' allegations must be accepted as true at this preliminary state of the investigation. In addition, ACSTO's argument is thoroughly rebutted by the Arizona Department of Revenue's recent report to the governor and the legislature that the Arizona tax-credit program cost the state more than $50 million in 2009. And Arizona's Attorney General, who represents the Department in this litigation, not only believes that respondents have standing, but has recently recommended "ending the tuition-tax-credit program for private schools during the economic downturn as [a]

possible way[ ] to bring in revenue. The tax program that gives a dollar-for-dollar credit of up to $1,000 for married couples for donations made to private-school scholarships *cost the state $58 million in 2009.*" Ginger Rough, *Goddard Outlines Plans for Education*, The Arizona Republic, Aug. 6, 2010, at B3 (emphasis added).

As its last resort, ACSTO advances the argument that the Arizona program cannot constitute a legislative spending program for purposes of applying *Flast*, because the Arizona Supreme Court has "conclusively determined as a matter of state law . . . that the money generated by the tax credit is private, not state, money." ACSTO Br. 9 (citing *Kotterman v. Killian*, 193 Ariz. 273 (1999)). As the court of appeals explained, ACSTO Pet. 12a n.8, *Kotterman* determined that the program's tax credit was not legislative spending *as a matter of state law. See Winn*, 562 F.2d at 1010 n.8. The question here is whether the Arizona program is a legislative spending program for the purposes of the standing requirement of Article III of the United States Constitution. Those are not the same questions.

The primary objection made by the United States to respondents' standing appears to be that *Flast* recognized taxpayer standing to challenge "legislatively mandated grants to religious organizations," and that the Court has limited *Flast* "to those facts." U.S. Br. 6-7. The premise of this argument, however, is completely incorrect. The federal statute challenged in *Flast* did *not* "mandate grants to religious

organizations." It "established a program for financial assistance to local educational agencies for the education of low-income families." *Flast*, 392 U.S. at 86. The only grants mandated by the *Flast* program were grants "made *to state educational agencies*, which pass the payments on in the form of grants to local educational agencies." *Id.* (emphasis added).

It is also wrong to say, as the United States does, that the Court "has *not allowed* taxpayer standing" to challenge tax expenditures since *Flast*, U.S. Br. 7 (emphasis added), but has limited *Flast* so as to permit taxpayers to challenge only expenditures made through legislative appropriations. The Court has "allowed" taxpayer standing in at least four such cases – taxpayer challenges to tax deductions (*Mueller*), credits (*Nyquist* and *Hibbs*) and exemptions (*Walz*). What the United States probably means to say is that Court opinions have never *expressly addressed* taxpayer standing in the tax expenditure cases it has adjudicated on the merits since *Flast*. That is true. The Court's silence, however, was, as explained above, almost certainly due to the belief that the issue had been settled (a belief that the United States apparently shared when it previously participated in this case as *amicus*). The United States' other contentions that respondents lack standing are based on its demonstrably incorrect description of the Arizona program as one in which Arizona has "voluntarily forego[ne]" tax collection "from individuals who make private and voluntary donations to STOs" that "do [] not harm respondents." U.S. Br. 6.

III. THE ARIZONA PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE.

In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court permitted a state to use state-funded vouchers to pay tuition for children to enable them to attend non-public, religious and non-religious elementary and secondary schools. It did that in order to permit a state to help poor inner-city children escape a failed public school system that was not able to offer them a minimally adequate education. The state provided financial help directly to parents in the form of school vouchers in a standard amount, and awarded the vouchers according to financial need. The vouchers were distributed with no reference to the parents' or child's religion, and did not depend on whether the child would attend a religious or secular school. Schools participating in the program had to agree not to discriminate on the basis of religion in their acceptance or treatment of their students. *Zelman*, 536 U.S. at 644-647.

Respondents in this case do not ask the Court to overturn *Zelman*, or to modify it in any respect. What respondents ask is that they be permitted to have the district court consider the constitutionality of an Arizona voucher program that could hardly be more different from the program upheld by the Court in *Zelman*. In the *Zelman* program, parents of children in the Cleveland public school district were awarded vouchers "according to financial need." *Id.* at 646. All parents in the same income category were entitled to vouchers in the same statutorily prescribed amount.

In Arizona, by contrast, religious STOs disburse more than $30 million of Arizona income tax revenues each year to a small percentage of Arizona schoolchildren whom *they choose to support*, and in whatever amounts *they choose to provide*. These religious STOs take a child's religion into account in deciding whether, and in what amount, to award a state-funded scholarship to a child, and they require children to attend a religious school, and to participate in all the religious worship activities required in that school, in order to get a scholarship. In 2009, 27,658 Arizona children, out of 1,012,068 Arizona children attending public school in Arizona, received scholarships under the tax-credit program. State Br. App. 27; Education Bug, Arizona Public School Directory, http://arizona.educationbug.org/public-schools/ (last visited Sept. 12, 2010).

There is no income-based or any other kind of equality in the Arizona program. All STOs are free to award scholarships from state funds to students chosen by them, according to their standards, from among all the school-age children in Arizona. Religious STOs, which control a majority of the scholarship funds, use religious standards to make those awards. Less than 3% of Arizona school-age children receive Arizona program scholarships each year, and the average annual scholarship has been less than $2,000 – far less than the average annual tuition at Arizona non-public schools. The Arizona program is not a program, like the program in *Zelman*, that awards state financial aid on a uniform basis to a

statutorily defined educationally or financially needy student population. It is a program in which the majority of state aid is given on the basis of religion to a relatively very few students, most of whom are chosen by religious organizations on a non-uniform basis from among all the school-age children in Arizona. *Zelman* did not approve of that kind of program.

A. The Arizona Program Violates *Zelman*

The use of state tax revenues to fund religious education for elementary and secondary school children is in obvious tension with the fundamental Establishment Clause principle that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . . to teach or practice religion," as well as with the principle that a state "cannot consistently with the [Establishment Clause] of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). Prior to *Zelman*, this principle permitted states to give financial support for the *non*-religious activities of non-public religious elementary and secondary schools, as part of programs to provide state financial aid to both secular and religious institutions on a religiously-neutral basis. In *Everson*, for example, the Court upheld a New Jersey program that reimbursed all parents for the cost of transporting their children to public or private (including religious) schools on public buses.

After *Everson*, the Court upheld religiously-neutral programs that lent books on secular subjects to parochial school students, as well as to students at non-religious schools,[6] reimbursed parochial as well as secular schools for the expense of administering state-prepared examinations on secular subjects,[7] supported construction by colleges, including church-related colleges, of facilities used exclusively for secular educational purposes,[8] as here public school teachers to offer remedial classes in secular subjects at parochial and non-religious schools,[9] and provided computers and other "secular content" teaching aids to parochial and non-religious schools.[10]

Prior to *Zelman*, however, the Court had not permitted states to use tax-raised funds to provide financial aid to religious schools to support the *religious* instructional activities of those schools.[11] The Court insisted that such aid be restricted to non-religious uses. *See, e.g.*, Laurence H. Tribe, *American Constitutional Law*, 1226 (2d ed. 1988): "Where state aid, by its nature, might be used [by religious schools]

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[6] *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

[7] *Wolman v. Walter*, 433 U.S. 229 (1977).

[8] *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976).

[9] *Agostini v. Felton*, 521 U.S. 203 (1997).

[10] *Mitchell v. Helms*, 530 U.S. 793 (2000).

[11] *See, e.g., Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472 (1973).

either for secular or for non-secular purposes, the Court requires mechanisms to ensure that the aid is used for secular purposes alone." *See also Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (aid under the federal Adolescent Family Life Act cannot constitutionally be used to fund "'specifically religious activit[ies].'") (citations omitted).

State programs that pay all or part of the tuition at religious elementary and secondary schools out of general tax revenues are therefore in danger of conflicting with the basic principle that citizens not be taxed to support the religious education of other people's children. In *Zelman*, the Court resolved this tension by holding that there a constitutionally significant difference between governmental programs that "provide aid *directly* to religious schools" and indirect aid programs that provide aid "*to [parents] who, in turn*, direct the aid to religious schools . . . of their own choosing." *Zelman*, 536 U.S. at 649 (emphasis added). Chief Justice Rehnquist's opinion for the Court in *Zelman* explained that, when government provides financial support for sectarian religious instruction by giving tuition aid *to parents on a religiously-neutral basis*, with no strings attached, so that the parents may determine whether to use the aid at a religious or non-religious school, "the circuit between government and religion [is] broken, and the Establishment Clause [is] not implicated." *Id.* at 652.

The *Zelman* opinion made clear that the circuit between government and religion is *not* broken,

however, unless the state program is "neutral in all respects toward religion," and provides parents with "true private choice" in selecting a school at which to use the aid. *Id.* at 653. The program must, in addition, be enacted for a "valid secular purpose." *Id.* at 649. The *Zelman* program satisfied each of these three requirements. It served the obviously "valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system." *Id.* at 649. It was neutral in all respects toward religion because the *Zelman* vouchers *were awarded to parents* on the basis of "'secular criteria that neither favor nor disfavor religion.'" *Id.* at 653 (citations omitted). And since parents were free to use the *Zelman* vouchers toward tuition at any participating public or private school in the Cleveland area, the *Zelman* program was one of "true private choice." *Id.* at 653.

Arizona's tax credit program, as applied, plainly does not satisfy two of *Zelman*'s three prongs, and very likely does not satisfy the third. The Court has not clarified, since *Zelman*, how it will apply the requirement that a voucher program serve a valid secular purpose, should that factor become determinative in a case. The program in *Zelman* left no doubts on that score. A program narrowly tailored, as the *Zelman* program was, to permit children of low-income families to obtain an adequate education unavailable to them in a failed public school district, might well survive even the strictest judicial means-ends scrutiny. Petitioners and their *amici* appear to

believe that the lowest level of scrutiny is applicable in determining whether a sufficient secular state purpose exists. Respondents believe that substantially more should be required to justify using state tax revenues to pay for religious education, even when *Zelman*'s two other requirements are satisfied.

It is not necessary to resolve that issue in this case, however, because the Arizona program utterly fails to comply with the other two prongs of the *Zelman* test. As for religious neutrality, even if the Arizona program were designed to serve a compelling secular purpose, it would nevertheless clearly violate the Establishment Clause because of the fact that more than half of its scholarships are awarded to parents and children on the basis of their religion. That pervasive religious discrimination in the distribution of program scholarships violates *Zelman*'s explicit requirement that state-funded tuition benefits be "*available to participating families on neutral terms, with no reference to religion*." 536 U.S. at 653 (emphasis added). Petitioners argue that it does not matter that the decisions to award most of the Arizona program's scholarships are made on the basis of the scholarship applicant's religion, because the Arizona *statute* is religiously neutral on its face. As *Zelman* makes clear, however, that is not the constitutionally-required neutrality. Government financial aid to education must be *awarded* on a religiously neutral basis. Regardless of the facial religious neutrality of a school-voucher program statute, the Constitution does not permit a program in which

vouchers are disbursed to some parents and not to others, depending upon the parents' or their children's religion.

The Arizona program's lack of religious neutrality in awarding scholarships also causes the program to violate *Zelman*'s requirement that parents must have a "genuine and independent" choice about where to use scholarships paid for by state funds. 536 U.S. at 649. The *Zelman* Court held that parental choice was present there because, after receiving a voucher, Cleveland parents could use the voucher at any participating school they chose. *Id.* at 646. The majority of parents who receive scholarships under the Arizona program, however, are not permitted to make that choice.

Some have suggested that this deprivation of parental choice about where to use a scholarship, once it is awarded, does not create a parental-choice problem, because parents remain free to choose, from a broad spectrum of STOs, the STO from which to seek aid. That, however, does not provide parents with a free choice about where to use state aid because it does not guarantee, or even make it likely, that an Arizona parent will receive a program scholarship in the first place. Arizona STOs are not obligated to award a scholarship to a parent just because a parent applies for one; STOs may select scholarship students on any basis they wish, as long as they consider the financial need of applicants. Parents who want their child to attend a particular religious school may locate a religious STO that awards scholarships to that school, but that STO may decide, on

any basis it wishes, including whether the STO believes that the parents have demonstrated a sufficiently strong commitment to the church or temple – not to award a scholarship to those parents at all. Those parents have no free choice about where to use state scholarship aid because the religious STO has decided not to award a scholarship to their child. Parents who would prefer to send their child to a non-religious school may apply for a scholarship at a non-religious STO, but that STO, which has no parishioners it can ask to support its program at no cost to themselves, may well not have sufficient funds to award scholarships to all parents who apply. Non-religious STOs appear to have long waiting lists of applicants, *see Winn*, 586 F.3d at 652, and even if the parents are awarded a scholarship, it may be in an amount far less than would be available from a religious STO, and also less than the parents will need to afford to enroll their child at a non-public school. The Arizona program is one of STO choice, not parental choice.

Petitioners and their *amici* try to obscure the fact that most of the Arizona program's scholarships are awarded by religious organizations on the basis of religion by the mantra that the Arizona program contains a "multitude of private choices." *See* ACSTO Br. 55; State Br. 3 n.1; U.S. Br. 17. By that they presumably mean to refer to the choices that Arizona income-taxpayers have about whether to "contribute" their tax payments to an STO, that taxpayers have about which STO to favor with that payment, that STOs have about which children to

favor with scholarships, and that STOs have about how much state money should be given to each chosen child. That "multitude of private choices," however, does not include the one choice that *Zelman* and the Establishment Clause require: *parental* choice about where to use a state-funded scholarship awarded to the parents on a religiously-neutral basis.

B. State Benefit Programs May Not Constitutionally Distribute State-Funded Benefits to Beneficiaries on the Basis of Religion.

Zelman's requirement of religious neutrality in the award of state-funded scholarships or school vouchers is reflective of a broader principle forbidding the use of religion as a criterion for distributing *any* government benefits in the United States. Arizona's STOs are organizations that receive and disburse government funds to beneficiaries as part of a government benefits program. Before *Zelman* was decided, the court had made clear in *Bowen v. Kendrick*, 487 U.S. 589 (1988), that, if they are grantees of government funds that undertake to distribute those funds to a class of beneficiaries defined by the government, organizations may not select those beneficiaries on the basis of religion, or require beneficiaries to participate in religious activity in order to obtain the state program's benefits.

In *Bowen*, the Court addressed the constitutionality of the federal Adolescent Family Life Act (AFLA), a federal statutory program that authorized federal financial grants to private, non-profit, grantee organizations that were to use those funds to provide counseling and education services to adolescents regarding teenage sexuality and pregnancy. The statute, which was religiously neutral on its face, provided that organizations "with institutional ties to religious denominations" might participate in the program as service-providing grantees. *Bowen*, 487 U.S. at 597. Federal taxpayers challenged the statute, both on its face and as applied. The facial challenge was based on the fact that the statute allowed religious organizations to participate in the program as program grantees. The as-applied challenge was based on plaintiffs' allegations that religious-organization grantees had used AFLA grants to "inculcate the views of a particular religious faith." *Id.* at 621.

The Court denied the facial challenge in *Bowen*, holding that the statute was not invalid simply because it permitted religious organizations to be program grantees. *Id.* at 618. But the Court then held that AFLA *would* be unconstitutional *as applied* if those religious grantees either were "institutions that are 'pervasively sectarian,'" or were institutions that used the federal funds "to inculcate the views of a particular religious faith." *Id.* at 610, 621. Arizona's religious STOs fit both of these descriptions. They are pervasively sectarian, because all they do is give

financial aid to parents and children, petitioners appear to be misled by their incorrect identification of the role that STOs play in the Arizona program. STOs are not program beneficiaries. They do not play the role in the Arizona scheme that parents and children played in the *Zelman* program. They receive state funds that the state legislature has decided should be used to pay tuition for children attending non-public schools. The legislature has left it up to individual income-tax payers to decide, by paying part of their taxes to an STO, how many dollars of state tax revenues will be used for the state-funded scholarships, but the scholarships are nevertheless unquestionably funded by income-tax revenues, not by the "contributing" taxpayers' own money. Those taxpayers, and the STOs to whom they contribute, are not the program's beneficiaries; the parents and children who receive scholarships are the beneficiaries of the program. In *Zelman*, state funds were used to pay for religious education, but only after the *beneficiaries* of the program -- the parents of low-income Cleveland school children – received the funds and decided how to use them in that way. It would clearly have been unconstitutional if the decisions about *which* parents were to be beneficiaries, were to be made on the basis of religion before the benefits reached the parents.[12]

[12] The Arizona program can also be understood, with the same result, as a program in which Arizona's STOs function as "government actors," who are themselves subject to the

(Continued on following page)

Establishment Clause. *See Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 378 (1995). ("We have held once, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and said many times, that actions of private entities can sometimes be regarded as governmental action for constitutional purposes."). In holding Amtrak to be a government actor for purposes of the application of the First Amendment, Justice Scalia's opinion for the Court explained:

> That Government-created and-controlled corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself. It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, *Plessy v. Ferguson*, 163 U.S. 537 (1896), can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak. In *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230 (1957) (*per curiam*), we held that Girard College, which had been built and maintained pursuant to a privately erected trust, was nevertheless a governmental actor for constitutional purposes because it was operated and controlled by a board of state appointees, which was itself a state agency. *Id.*, at 231. Amtrak seems to us an *a fortiori* case.

Lebron, 513 U.S. at 397.

The relationship between the government of Arizona and Arizona's STOs is obviously different from the relationship between the United States and Amtrak in *Lebron*. There are, for one thing, more than 50 STOs, while there was only one Amtrak. But it is doubtful that the *Lebron* Court would have held that a state could certify 50 different taxicab companies, each related to the state in the same way that Amtrak is related to the United States, and permit half of those 50 companies to serve only black or only white riders, or to choose fares on the basis of religion.

CONCLUSION

The decision of the court of appeals remanding the case for further proceedings should be affirmed.

Respectfully submitted,

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REPLY BRIEF

(34) (34)

Nos. 09-987, 09-991

Supreme Court, U.S.
FILED
AUG 25 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING A CHANGE IN STATE LAW

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REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING A CHANGE IN STATE LAW

The Respondents, Kathleen M. Winn, et al., filed a supplemental brief suggesting that the Arizona Legislature's recent irrelevant amendments to the challenged Scholarship Tax Credit Program, currently codified at Ariz. Rev. Stat. Ann. (A.R.S.) § 43-1089 and reproduced at Garriott Pet. App. 117a-120a,[1] which Petitioners timely brought to the Court's attention, are cause to remand the case to the District Court. Respondents' Supplemental Brief Regarding A Change In State Law (hereafter "Respondents' Supplemental Br.") 11. Respondents' contentions are meritless for three reasons. First, the amendments do not affect the constitutional issues Respondents raise in their Complaint. Second, the amendments do not answer the question whether Respondents have standing as taxpayers to raise their claims in the first instance. Finally, and most importantly, Respondents did not identify a single way in which the amendments impact or change the issues upon which the Court granted certiorari.

ARGUMENT

Respondents' supplemental brief identifies irrelevant legislative amendments to the challenged

[1] Reference is to Petitioner Garriott's Appendix in support of the Petition for Writ of Certiorari.

Scholarship Tax Credit Program and incorrectly insinuates that Petitioners improperly withheld information from the Court.

As an initial matter, Petitioners' merits briefs gave timely notice concerning the fact and substance of the legislative amendments contained in House Bill 2664. The legislature passed House Bill 2664 on April 28, 2010, but the Governor did not sign that bill until May 10, 2010—seven days after Petitioners filed their reply briefs regarding whether the Court should grant certiorari. *Arizona State Legislature Bill Status Overview*, http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2664o.asp (last visited Aug. 23, 2010). The Governor had signed Senate Bill 1274 before the reply briefs were filed, but Respondents themselves informed this Court about that bill and raised no concerns that it would impact their constitutional claims. Respondents' Br. in Opp'n 12. Despite Respondents' claimed lack of knowledge regarding House Bill 2664, which was introduced on February 8, 2010 in substantially the same form as finally passed, *Arizona State Legislative Bill Status Overview*, *supra*, their opposition brief said they were monitoring the various legislative proposals to amend the program and never claimed any of the pending bills would impact their claims—to the contrary they claimed no "relevant" legislation had been introduced. Respondents' Br. in Opp'n 11-12 ("No relevant legislation had resulted at the time this brief was written. The 'reform' proposal that seems to have the greatest chance of enactment at the current legislative session

[is Senate Bill 1274]. . . ."). In addition to the fact that Respondents' supplemental brief contradicts their opposition brief, their proposal to remand this case to the District Court deserves to be rejected for three reasons.

First, the legislative amendments do not change the way the program operates and therefore do not change the constitutional questions raised by Respondents' Complaint. The amendments did not change the way School Tuition Organizations are created or the fundamental nature of how they operate. School Tuition Organizations must still be founded by private individuals as charitable organizations pursuant to 26 U.S.C. § 501(c)(3). *Compare* A.R.S. § 43-1089(G)(3) Garriott Pet. App. 120a *with* A.R.S. § 43-1502(A) (effective Dec. 31, 2010) Parents' Br. App. 6a.[2] Anyone may still form a School Tuition Organization that funds all private schools, or a subset of private schools, so long as they do so "without limiting availability to students of one school." *Compare* A.R.S. § 43-1089(G)(3) Garriott Pet. App. 120a *with* A.R.S. § 43-1503(B)(2) (effective Dec. 31, 2010) Parents' Br. App. 10a. School Tuition Organizations have always been required to dedicate ninety percent of their revenues to fund scholarships for children to attend private schools, which means they

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[2] "Parents' Br. App." refers to the brief and appendix filed by parents Glenn Dennard and Luis Moscoso and the Arizona School Choice Trust as Respondents in Support of Petitioners pursuant to Sup. Ct. R. 12.6.

have always been required to be organized "solely" to raise money for private school scholarships. *Compare* A.R.S. § 43-1089(G)(3) Garriott Pet. App. 120a *with* A.R.S. § 43-1503(B)(1) (effective Dec. 31, 2010) Parents' Br. 9a. Thus, nothing about the amendments change any parties' argument regarding whether or not the Scholarship Tax Credit Program is a program of genuine private charity.

The recent legislative amendments merely clarify that the Arizona Department of Revenue has the authority to inform taxpayers which School Tuition Organizations satisfy these criteria and provide the Department a ministerial method of doing so by requiring School Tuition Organizations to file paperwork certifying their compliance with the statutory requirements.[3] A.R.S. § 43-1502 (effective Dec. 31, 2010); Parents' Br. App. 6a-9a.

Second, even if the legislative amendments did have some arguable bearing on the Establishment

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[3] Respondents further assert that School Tuition Organizations are newly required to report various types of information to the Department of Revenue. Respondents' Supplemental Br. 5. However, the reporting requirements Respondents list, except for the requirements to report certain salary information and recipient income levels, were part of the program when the petitions for certiorari were filed. A.R.S. § 43-1089(F) Garriott Pet. App. 118a-119a (requiring School Tuition Organizations to report the number and amount of contributions they receive each year; the number and amount of scholarships they award each year; and the number and amount of scholarships awarded according to the schools the students attend).

Clause issues, which they do not, the amendments certainly have no impact on whether the Respondents have standing as taxpayers to raise their claims. The amendments do not change the fact that Respondents are still "'third parties' whose own tax liability" is not implicated by the tax credit. *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2326 (2010) (discussing Respondents in *this* case while distinguishing *Levin* from this Court's prior decision in this case, *Hibbs v. Winn*, 542 U.S. 88 (2004)). Whether a taxpayer whose own tax liability is so far removed from the challenged program has suffered the requisite injury under the Establishment Clause is a threshold question at the heart of the Arizona Christian School Tuition Organization's petition. Br. Pet'r Ariz. Christian Sch. Tuition Org. 15 (Respondents "do not allege that Arizona is extracting *their money* in support of religion, which is a necessary predicate to any taxpayer injury in the Establishment Clause context").

Third, and most importantly, Respondents' supplemental brief in no way explains why the recent legislative amendments make any difference regarding this Court's decision to grant certiorari in this case. The Respondents admit in their brief that the Ninth Circuit's holding is premised on the panel's view that School Tuition Organizations essentially function as agents of the state when awarding scholarships. Respondents' Supplemental Br. 9. Respondents then assert that the "new legislation strongly confirms the [Ninth Circuit's] conclusion. . . ." *Id.* at 10. But Respondents fail to explain how the fact that

Arizona has marginally increased its regulations in any way changes the Ninth Circuit's analysis. Indeed, they argue that the amendments *reinforce* that analysis. Advancing an argument that recent legislative amendments actually strengthen their case in an attempt to urge this Court to reverse its decision granting certiorari is legally and logically inconsistent.

CONCLUSION

Glenn Dennard, Luis Moscoso, and the Arizona School Choice Trust, along with Petitioners, timely notified this Court of the recent legislative amendments discussed in Respondents' supplemental brief. The amendments are primarily ministerial in nature and do not change the way the Scholarship Tax Credit Program or School Tuition Organizations operate. The amendments therefore do not affect any of the issues raised by the petitions. The Court should disregard Respondents' supplemental brief.

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August 25, 2010

REPLY BRIEF

Supreme Court, U.S.
AUG 26 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

In the Supreme Court of the United States

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On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION'S REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING A CHANGE IN STATE LAW

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Abbreviations Key:

ACSTO Br.	Brief For Petitioner Arizona Christian School Tuition Organization
ACSTO Pet. App.	Appendix to ACSTO's Petition for Certiorari
Opp.	Brief in Opposition To Petitions for Certiorari
State App.	Appendix To State's Brief on the Merits

INTRODUCTION

Comes now Petitioner Arizona Christian School Tuition Organization ("ACSTO") and files this supplemental brief in reply to Respondents' Supplemental Brief Regarding A Change In State Law. In their brief, Respondents highlight recent amendments to the state law at issue in this case, A.R.S. § 43-1089. The State included these amendments in the appendix to its merits brief. State App. 1-17.[1] Those amendments, S.B. 1274 and H.B. 2664, were adopted on April 27, 2010, and May 10, 2010, respectively. *Id.* at 1, 9. S.B. 1274 went into effect on July 27, 2010, and H.B. 2664 does not go into effect until December 31, 2010. *Id.*

Respondents claim that these recent amendments to § 43-1089 impact this litigation, and suggest that this Court remand the case so that they can amend their Complaint to reflect the changes, or so that the lower court can assess their impact on the case. Respondents' Supp. Br. 10-11. Remand would be fruitless, however, because neither

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[1] Respondents claim that they filed their supplemental brief "to notify the Court of the change in Arizona legislation as promptly as possible after [they] became aware of it." Respondents' Br. 3. But the Respondents were aware of the passage of S.B. 1274 at least since June 2, 2010, when they received the proposed list for the Joint Appendix. Further, Respondents' claim of lack of knowledge regarding S.B. 1274 and H.B. 2664 cannot be squared with the thorough knowledge of the ongoing legislative efforts to amend § 43-1089 Respondents exhibited in their Brief in Opposition. Opp. 9-12. In that brief, they prognosticated (correctly) that S.B. 1274 had "the greatest chance of enactment at the current legislative session." *Id.*

amendment has any bearing on Respondents' Article III standing to sue. Indeed, Respondents lack taxpayer standing to challenge either the old or new version of § 43-1089.

The recent amendments also do not impact the merits of Respondents' Establishment Clause claims because they do not alter in any way the allegations in their Complaint regarding the alleged unconstitutionality of Arizona's tuition tax credit program. Respondents' supplemental brief should therefore be disregarded by this Court.

ARGUMENT

I. Respondents' Brief Is Untimely.

Supreme Court Rule 15.8 states, *inter alia*, that "[a]ny party may file a supplemental brief *at any time while a petition for a writ of certiorari is pending*, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing." S. Ct. Rule 15.8 (emphasis added). Respondents filed their supplemental brief *after* this Court granted the State and ACSTO's petitions for certiorari. Their brief is therefore untimely and not permitted by this Court's rules. This Court should disregard it. Respondents have stated that they will address the legislative amendments that will go into effect on December 31, 2010, in their merits brief. Respondents' Supp. Br. 10. That will be sufficient to advise the Court of the impact Respondents believe they may have.

II. S.B. 1274 and H.B. 2664 Do Not Impact The Article III Standing Analysis.

S.B. 1274 and H.B. 2664 do not have any bearing on Respondents' inability to establish Article III standing. Their standing argument is predicated solely on the theory that the tax credit reduces State revenues. ACSTO Pet. App. 126a. As discussed in Petitioner ACSTO's merits brief, Respondents' theory of standing suffers from numerous fatal flaws. Nothing in S.B. 1274 and H.B. 2664 impacts or changes any of these flaws in Respondents' theory of standing.

Respondents' mischaracterization of their standing argument, however, warrants a brief rebuttal. They now claim for the first time that they have taxpayer standing because they are "taxpayers who are taxed to fund the scholarship program." Respondents' Supp. Br. 8. Merely stating this does not make it so, factually or legally. As discussed in Petitioner ACSTO's merits brief, the tax credit statute does not impose a tax on the Respondents or any other Arizona taxpayer. ACSTO Br. 23-25. Further, Respondents disclaimed that the tax credit imposed a tax on them when this case was before this Court on the question of the applicability of the Tax Injunction Act. Respondents' Br. 11, S. Ct. Case No. 02-1809, Dec. 19, 2003 (arguing that the Act did not apply because "[c]onstitutional challenges to state tax credits . . . are not suits by taxpayers seeking to postpone or avoid the payment of state taxes"). *See also Hibbs v. Winn*, 542 U.S. 88, 104 (2004) (Respondents' lawsuit is a "[t]hird party suit[]" which does not "seek[] to stop the collection

(or contest the validity) of a tax" imposed on them). Respondents' arguments contradicting their previous admissions, and this Court's prior findings, should be disregarded by this Court.[2]

III. The Amendments To § 43-1089 Have No Bearing On Respondents' Establishment Clause Claims.

S.B. 1274 and H.B. 2664 also do not change or alter in any way the aspects of the tax credit program Respondents attack as unconstitutional. Respondents' substantive complaints about the program are that it allegedly: 1) allows STOs to limit scholarships to religious schools; 2) results in scholarship funds being concentrated in religiously-affiliated STOs; and 3) prevents parents who desire a secular education for their child from obtaining a scholarship. ACSTO Pet. App. 123a-124a.

The language of S.B. 1274 and H.B. 2664, and Respondents' descriptions of them, demonstrate that they do not alter or change these aspects of § 43-1089. *See* Respondents' Supp. Br. 4-8. S.B. 1274 simply permits taxpayers to claim the credit for donations made during the previous tax year if the donation is made on or before April 15 of the following year. This is irrelevant to the issue before the Court.

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[2] It is inappropriate for Respondents to claim that no tax has been imposed on them to avoid imposition of the Tax Injunction Act, only to then reverse their admission in an attempt to prove an Establishment Clause violation.

As to H.B. 2664 (which goes into effect on December 31, 2010), its primary impact will merely be to move, but retain, several pre-existing sections of § 43-1089 to a new section of the Code. It also adds a few new requirements to these pre-existing aspects of the program, including requiring financial audits and/or reviews of STOs. But as with S.B. 1274, none of these changes in the law impacts in any way the aspects of the program to which Respondents object on Establishment Clause grounds. Further, these new requirements are no different than, and in many instances less demanding than, the requirements already imposed on STOs as 501(c)(3) nonprofit corporations at both the state and federal level.[3] With this in mind, following is a brief rebuttal to the arguments Respondents raise regarding H.B. 2664:

STO Annual Reports:

Respondents complain that under H.B. 2664 STOs will have to submit annual reports regarding their scholarship granting activities. Respondents' Supp. Br. 5. But the State has required annual reports containing the very statistics Respondents list since its inception. ACSTO Pet. App. 113a-114a, § 43-1089(F)(2-6). H.B. 2664 requires STOs to report on a few additional aspects of their giving practices (i.e., the number of scholarships awarded to financially needy students, and money being held for future scholarships), but these additional

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[3] STOs must be "exempt from federal taxation under section 501(c)(3) of the internal revenue code." ACSTO Pet. App. 115a, §43-1089(G)(3)

requirements have no bearing on Respondents' constitutional claims.

Respondents also complain that STOs will have to annually report the "names, job titles and annual salaries of the three [] employees who receive the highest annual salaries." Respondents' Supp. Br. 5. But federal law regarding 501(c)(3) corporations already requires STOs to annually report the same, and additional, information for its top five compensated employees. 26 U.S.C. § 6033(b)(6-7); IRS Form 990 at 7. In fact, the annual reports Arizona requires of STOs are similar to, yet less onerous than, the annual reports federal law requires of these same 501(c)(3) corporations. 26 U.S.C. § 6033(b)(1-7) (501(c)(3) corporations must, among other things, annually report their: gross income; expenses; disbursements; assets, liabilities, and net worth; total contributions received; the names and addresses of all substantial contributors; and the names, addresses, and compensation paid to top five compensated employees).

STO Certification:

Respondents complain that STOs will soon need to apply for and obtain certification from the Department of Revenue. Respondents' Supp. Br. 4. Once again, this has no impact on the aspects of the program Respondents challenge under the Establishment Clause.

Respondents find it particularly problematic that the Department of Revenue will maintain a

registry of certified STOs and will post this registry on its website. *Id.* But Arizona already maintains on its Corporation Commission website a searchable list of nonprofit corporations that have met the state's many requirements to obtain nonprofit status. *See* starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/connect.p?app=names-report.p. The STOs currently operating in Arizona, which must be nonprofit, 501(c)(3) corporations, can be found on this website. The only effect this amendment will have is to list a subgroup of Arizona nonprofit corporations on an additional website.

Revoking STO Certification:

Respondents also stress that under H.B. 2664 the State will have the authority to revoke an STO's certification if it engages in any prohibited activity. Respondents' Supp. Br. 7. Once again, this has no bearing on Respondents' claims of unconstitutionality. But it is also noteworthy that Arizona already has the authority to dissolve, let alone to revoke the certification of, nonprofit organizations authorized to operate in the State. *See* A.R.S. §§ 10-11420, 10-11421. The State's authority to revoke the certification of STOs pales in comparison to its already existing power to end their existence.

Audits and Financial Reviews of STOs:

H.B. 2664 requires STOs to conduct either an audit or financial review, depending on the amount of contributions they receive in a fiscal year, at their

own expense. State App. 15-17. While the federal government does not require 501(c)(3) corporations to conduct audits or financial reviews, it does require extensive annual reports regarding many aspects of their financial condition. *See* 26 U.S.C. § 6033(b)(1-7), *supra*. In addition, many states impose similar audit/financial review requirements on nonprofit corporations. *See, e.g.* Ark. Code Ann. § 4-28-403(b)(1); Cal. Gov. Code § 12586(e); Conn. Gen. Stat. Ann. § 21a-190c; Ga. Code Ann. § 43-17-5(b)(4), 225 Ill. Comp. Stat. Ann. 460/4(a); Kan. State. Ann. § 17-1763(c).

The annual financial reviews of STOs called for by H.B. 2664 are not anomalous, but rather are consistent with the annual financial review and reporting requirements that are a common feature of nonprofit life at the federal and state level. More importantly, H.B. 2664's audit/financial review requirement plainly does not alter or change in any way the aspects of the tax credit program to which Respondents object on constitutional grounds.

Scholarship Award Guidelines:

Respondents highlight that H.B. 2664 will require STOs to consider the financial need of applicants, and will prohibit awarding scholarships based solely on donor recommendations or allowing taxpayers to agree to swap donations with another taxpayer to benefit either taxpayer's own dependent. Respondents' Supp. Br. 6.[4]

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[4] A study from 2008 found that the 14 largest STOs (which supported both nonreligious and religious schools) placed

None of these changes address or alter any of the aspects of the tax credit program upon which Respondents base their Establishment Clause claim. They therefore do not impact this Court's consideration of the Respondents' constitutional challenge to A.R.S. § 43-1089.

The thrust of Respondents' argument regarding S.B. 1274 and H.B. 2664 is that they transmute STOs from private into state actors. Respondents' Supp. Br. 9-10. Respondents are mistaken. The above discussion shows that the requirements Arizona places on STOs (whether considering the old or new version of § 43-1089) are indistinguishable from, and in many instances less onerous than, the typical requirements placed on nonprofit organizations in Arizona, in other states, and at the federal level. STOs, like all other nonprofit organizations, retain their private character despite being regulated by, and having to report regarding their financial condition to, state and federal governments.

CONCLUSION

The passage of S.B. 1274 and H.B. 2664 has no bearing whatsoever on the question of

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strong emphasis on financial need in awarding scholarships. Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, at 2, archive.constantcontact.com/fs035/1011047932616/archive/1102823763902.html. These STOs, which accounted for over 70% of the available scholarship dollars, *id.*, included Petitioner ACSTO. Further, ACSTO has never knowingly permitted donors to engage in the practices prohibited by H.B. 2664.

Respondents' Article III standing. These amendments likewise leave intact and unchanged the aspects of the tax credit program Respondents challenge under the Establishment Clause. Accordingly, this Court should disregard Respondents' untimely supplemental brief.

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August 26, 2010

REPLY BRIEF

Nos. 09-987, 09-991

Supreme Court, U.S.
FILED
SEP 07 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER GALE GARRIOTT'S REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING A CHANGE IN STATE LAW

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REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING A CHANGE IN STATE LAW

A. Respondents' Brief Is Not Necessary or Supplemental.

Respondents claim that the purpose of their supplemental brief is to inform the Court of the 2010 amendments to Arizona's private-school-tuition-tax-credit program in A.R.S. § 43-1089 (Section 1089), but they acknowledge that the text of the amendments is reproduced in Petitioner Garriott's brief on the merits. Resp. Supp. Br. at 2. And, contrary to Respondents' assertion that Petitioners summarily dismissed the amendments in a footnote, Petitioner Garriott discussed the amendments in his merits brief. Pet. Garriott's Br. at 2, 4 n.2, 5 n.4, 10-11. Therefore, Respondents did not need to file their brief to inform the Court of the amendments because Petitioners had already provided that information. Further, Respondents will have the opportunity to address the amendments in their merits brief. Therefore, their supplemental brief does not present information "that was not available in time to be included in [Respondents'] brief" as Supreme Court Rule 26.6 requires. Because the brief is not necessary or supplemental, the Court should not consider it.

B. The Section 1089 Amendments Do Not Alter the Need for This Court's Review.

If the Court nevertheless considers Respondents' supplemental brief, it should reject Respondents' suggestion that it incorrectly granted certiorari.

Respondents assert that the Court may wish to reconsider its decision to grant certiorari because "the new legislation strongly confirms the conclusion that the relationship between Arizona and its STOs [school tuition organizations] may warrant Establishment Clause scrutiny of STO religious discrimination." Resp. Supp. Br. at 10. But the Court granted certiorari on this precise issue – that is, whether the lower court erred "in holding that if most taxpayers who contributed to STOs contributed to STOs that awarded scholarships to students attending religious schools, Section 1089 has the purpose and effect of advancing religion." Garriott Pet. at i. Under the amendments to Section 1089, anyone can still form an STO, taxpayers can still decide whether to make a voluntary contribution to the STO of their choice, and STOs can still decide which private schools they will support through scholarship awards. There is no reason to remand to the district court and the court of appeals to assess the impact of the amendments because the district court would be bound by the court of appeals' erroneous Establishment Clause analysis and the court of appeals would affirm based on that faulty analysis.

The same is true with regard to whether Respondents have standing as taxpayers to assert an Establishment Clause challenge to Section 1089 as amended – Section 1089 still provides tax credits for voluntary contributions to nonprofit organizations that award scholarships to children attending private schools, including religious schools. Respondents suggest that the amendments are relevant to the standing question by claiming that the taxpayer contributions to STOs are actually state revenues. Resp. Supp. Br. at 8-9. This argument is no different from the one that the court of appeals erroneously accepted in holding that Respondents had standing. Garriott Pet. App. at 14a ("By structuring the program as a dollar-for-dollar tax credit, the Arizona legislature has effectively created a grant program whereby the state legislature's funding of STOs is mediated through Arizona taxpayers."). Given the ten-year history of this case, Respondents' suggestion that the Court remand this fundamental issue of jurisdiction, instead of deciding it, is absurd.

Normally, when the Court remands matters to the district court to assess the impact of newly enacted legislation after granting certiorari, it vacates the lower court's decision. *See, e.g., Louisiana v. Hays*, 512 U.S. 1230 (1994) (vacating the three-judge district court decision in *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), and remanding for further consideration in light of a newly enacted Louisiana statute); *Fusari v. Steinberg*, 419 U.S. 379, 390-91 (1975) (vacating the three-judge district court decision and

remanding for reconsideration in light of the intervening changes in Connecticut law). Thus, if the amendments to Section 1089 would have affected the outcome of the court of appeals' decision, the appropriate remedy would be to vacate its earlier decision and remand to the district court to allow Respondents to amend their complaint in light of the statutory amendments. Because the amendments would not have affected the outcome of the court of appeals' decision, the Court should not remand the case without deciding the questions presented.[1]

C. The 2010 Amendments to Section 1089 Improve STOs' Accountability and Transparency; They Do Not Make STOs Agents of the State.

Respondents claim that the 2010 amendments to Section 1089 are relevant to their claim that STOs are the "state's surrogates to distribute government tax revenues." Resp. Supp. Br. at 3. The amendments make STOs more accountable and transparent and

---

[1] To the extent that the Court has exercised its discretion and has found that it improvidently granted certiorari review, it has done so when the question that it accepted for review was no longer properly before it. *See* Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, *Supreme Court Practice* 359-62 (9th ed. 2007) (listing cases in which the Court has dismissed certiorari as improvidently granted). Here, the amendments to the private school tuition tax credit do not affect the questions that the Petitions presented.

thus further the private-school-tuition-tax credit program's core purpose. The amendments do not change the fundamental characteristics of STOs that make them private organizations that the State regulates rather than state agencies.

As Respondents acknowledge, the Legislature enacted the 2010 amendments to Section 1089 based on a legislative task force's recommendations.[2] Resp. Supp. Br. at 3; *see also* Pet. Garriott's Br. at 10. The task force's purpose was to recommend measures to improve STOs' accountability and transparency. Ariz. H.R. Ad Hoc Comm. on Private School Tuition Tax Credit Review on HB 2664, 49th Leg. 1 (April 29, 2010). Most of the changes that the task force recommended and the Legislature adopted do indeed improve STOs' accountability or transparency or both:[3]

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[2] The earlier enacted amendment to Section 1089 in S.B. 1274 allows a taxpayer who contributes to an STO before April 15 to take the credit either in the year that he or she makes the contribution or in the preceding tax year. 2010 Ariz. Sess. Laws, ch. 188. *See* Garriott Pet. App. 1-4. This amendment does not alter the nature of the tax credit; it simply allows low-income individuals to determine if they can afford to take the credit by permitting them to make a contribution after they are certain of the amount of taxes that they owe.

[3] The requirement in A.R.S. § 43-1089(C) that the Arizona Department of Revenue (Department) adjust the tax credit's amount based on the Consumer Price Index does not further accountability or transparency but it is a practical method of ensuring that inflation does not devalue the credit over time. The requirement is not relevant to the issues presented here.

- **The Certification Requirement.** The requirement in A.R.S. § 43-1603(B)[4] that STOs obtain and retain certification from the Arizona Department of Revenue (Department) ensures that STOs will follow the statutory requirements. The requirements in A.R.S. §§ 43-1602(B) and -1089(A) that the Department maintain a public registry of currently certified STOs, keep the registry up to date, post the registry on its official website, and deny a credit for contributions to STOs that are not certified ensures that taxpayers can find out which STOs are certified and will contribute only to certified STOs.

- **The Regulation of STOs' Expenditures.** Section 1089 has always required that an STO "allocate[ ] at least ninety per cent of its annual revenue for educational scholarships and tuition grants." 1997 Ariz. Sess. Laws, ch. 48, § 2 (defining an STO). The requirement that the Department deny or revoke an STO's certification if it does not comply with this requirement holds STOs accountable if they fail to comply with the statute. The requirement that STOs report the names, job titles, and annual

[4] The Legislature originally codified H.B. 2664 at A.R.S. §§ 43-1501 to -1505 but the legislative council renumbered the provisions as A.R.S. §§ 43-1601 to -1605 as authorized by A.R.S. § 41-1304.02.

salaries of their three highest-paid employees allows taxpayers to evaluate this information when they are deciding whether to contribute to an STO.

- **Scholarship Award Standards.** The requirement in A.R.S. § 43-1603(D)(2) that STOs consider the financial need of their applicants makes STOs more accountable for the standards that they use in awarding scholarships. And the requirement in A.R.S. § 43-1604(7) that STOs report the total dollar amount of scholarships awarded to students in low- and middle-income families allows taxpayers to evaluate this information when choosing to contribute to a particular STO. Under A.R.S. § 43-1603(B), STOs cannot (1) award scholarships based solely on donor recommendations, (2) allow donors to designate student beneficiaries as a condition of any contribution to the STO, or (3) "facilitate, encourage or knowingly permit the exchange of beneficiary student designations." These provisions make STOs accountable if they allow donors to benefit directly or indirectly from their contributions. Moreover, this is consistent with STOs' status as § 501(c)(3) organizations. *See* 26 C.F.R. § 1.501(c)(3)-1(d)(ii) (to meet § 501(c)(3) requirements, an organization must establish that it is not organized or operated for the benefit of private interests).

- **State Supervision of STOs' Compliance with Certification Requirements.** Requiring STOs to be certified would not make them more accountable unless there was a remedy for their failure to comply with the certification requirements. Thus, requiring the Department to give an STO notice of its failure to comply with statutory requirements, A.R.S. § 43-1602(C), and giving the Department the authority to revoke an STO's certification if it fails or refuses to comply after ninety days, A.R.S. § 43-1602(D), makes STOs accountable if they fail to comply with statutory requirements.

- **Audits of STO Operations.** The requirement in A.R.S. § 43-1605 that STOs demonstrate that they are in compliance with the statute's fiscal requirements by having an independent certified public accountant conduct an audit or a financial review and submit the audit or financial review to the Department makes STOs accountable if they fail to meet statutory requirements.

The amendments to Section 1089 do not make STOs state agents because under the amendments, STOs continue to be formed by private individuals as Section 501(c)(3) organizations that determine to whom and under what standards they will award scholarships to designated private schools. The additional state regulation that the amendments impose

on STOs is "no different than, and in many instances less demanding than, the requirements already imposed on STOs as 501(c)(3) nonprofit corporations at both the state and federal level." Pet. Arizona Christian School Tuition Organization's (ACSTO's) Reply to Respondents' Supplemental Brief Regarding a Change in State Law at 5-8 (discussing federal and state requirements imposed on § 501(c)(3) organizations). And, as ACSTO also notes, other state tuition tax credit programs have auditing requirements. *Id.* at 8. Finally, Arizona requires other organizations to be certified as a condition of granting a credit to an individual who contributes to the organization. *See, e.g.*, A.R.S. § 43-1074 (allowing an income tax credit to certain employees of certain businesses located in enterprise zones provided that the business reports and certifies required information to the Department); A.R.S. § 43-1088 (allowing an income-tax credit to individuals who contribute to charitable organizations that provide services to low-income families or to chronically ill or disabled children if the organization provides the Department with written certification of compliance with statutory criteria).

CONCLUSION

For the foregoing reasons, the Court should disregard Respondents' supplemental brief. Because the 2010 amendments to Section 1089 do not alter the need for this Court's review, it should reject Respondents' suggestion that it incorrectly granted certiorari.

Respectfully submitted,

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REPLY BRIEF

Nos. 09-987, 09-991

In the
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ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
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On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Abbreviations Key:

ACSTO Br.	Brief for Petitioner ACSTO
ACSTO Pet. App.	Appendix to ACSTO's Petition for Certiorari
ACSTO Supp. Br.	Petitioner ACSTO's Reply to Respondents' Supplemental Brief Regarding a Change in State Law
AHA Br.	Brief *Amici Curiae* of the American Humanist Association, *et al.*, in Support of Respondents
ASCT Pet. App.	Appendix to ASCT's Petition for Certiorari
AUSCS Br.	Brief for Americans United for Separation of Church and State, *et al.*, as *Amici Curiae* in Support of Respondents
Cato Br.	Brief of The Cato Institute, *et al.*, as *Amici Curiae* in Support of Petitioners
JA	Joint Appendix
Resp. Br.	Brief for Respondents
State App.	Appendix to State's Brief on the Merits

INTRODUCTION

The facts of this case are straightforward and undisputed. And as Petitioner ACSTO's opening brief shows, they establish that Respondents lack Article III standing and that the challenged tax credit complies with the Establishment Clause.

Respondents' claims to the contrary are based on multiple mischaracterizations of the record. For example, it is a fact that taxpayers donate their private money to STOs (which must be 501(c)(3) corporations) and then take the tax credit, just as taxpayers take a deduction when they donate to any 501(c)(3) group. But based on their novel theory that a state's decision not to tax is the same as a state's decision to tax and spend, Respondents claim that taxpayers donate "state funds" to STOs.

It is also a fact that the tax credit statute does not levy any tax on anyone. Respondents previously conceded this fact, *see* ACSTO Br. 19-20, and it is too late in the day for them to now ask in their Questions Presented whether "Arizona Taxpayers, whose taxes support all of the costs of the program, have standing in federal court to challenge its constitutionality." Resp. Br. i. The fact is that Respondents are not taxed even a penny to support this program, and for this reason (among others) they lack standing.

Also undisputed is the fact that an STO cannot send one penny to any private school (religious or secular) unless a parent chooses a school and applies for a scholarship. Respondents completely ignore

this fact by claiming that parental choice is not present in this program. But the fact is that without parents choosing a private school no money goes anywhere.

Respondents are unable to prevail under the facts as they exist, so they mischaracterize them. They then argue that these "facts" confer Article III standing and prove an Establishment Clause violation under an equally incorrect version of the law. Respondents' efforts to save their case find no support in the record, in the law, or in logic. The Ninth Circuit's decision should be reversed.

REPLY TO RESPONDENTS' PRIMARY FACTUAL DISTORTION

Most of Respondents' factual distortions are addressed within the relevant legal section below. But Petitioner ACSTO addresses Respondents' grandest mischaracterization—that the tax credit is a "government spending program." Resp. Br. 22—in this preliminary section because they base their entire case on it.

The Tax Credit Involves Private Money:

The tax credit statute authorizes taxpayers to take a credit for "voluntary cash contributions" to STOs. State App. 1; A.R.S. § 43-1089.A. In 2009 over 73,000 taxpayers took the credit. State App. 18. Further, "no money ever enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies

or public officials." *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999). It is clear, then, that this program involves private, not government, funds. *Id.* Respondents' amici appear to recognize this. MEA Br. 9 ("payments to STOs are made using private checking accounts").

Respondents' "Government Spending" Claim:

Respondents reject this fact, not because it is untrue, but because they must, in order to prop up their errant claim that they have Article III standing. Indeed, how could a taxpayer have standing to challenge how other private people spend their own money? Yet this is precisely what Respondents propose.

Their claim to Article III standing is based on the novel theory that a state's failure to collect anything less than 100% of income is the same as the state collecting and spending tax dollars. Resp. Br. 17 (tax policies that "reduce the revenues entering the treasury" are equivalent to the government spending tax revenues). The premise underlying Respondents' position is that an individual's entire income is presumptively government property and becomes his only when the government does *not* exercise its taxation power over all of it. Respondents' theory cannot be limited to tax credits, but rather also applies to every government decision to collect less tax revenues, including tax deductions, tax

exemptions; income-based tax brackets; non-taxable income; and more.[1]

Respondents argue that a tax credit is the equivalent of an expenditure of government funds, while a deduction is not, because a deduction results in a smaller tax benefit. Resp. Br. 6. But this is no distinction at all under Respondents' theory, since a deduction "reduces[] the revenues entering the treasury," *id.* at 17, just as a tax credit does. Whether the reduction is dollar for dollar or something less, the state's revenue is still "reduced."

Respondents also distinguish between the tax credit and a deduction by claiming that the funds used to make a charitable donation are a taxpayer's private funds, while the funds donated to an STO are state funds. Respondents' argument is based on two fictions. First, they pretend that a taxpayer is "entitled to keep" all the money he otherwise could send to a charity and upon which he could take a deduction. Resp. Br. 6. But this is untrue. If a taxpayer kept this money he would be taxed within the appropriate tax bracket on those funds.

Second, Respondents also pretend that, unlike the money upon which a charitable deduction is taken, the taxpayer taking the credit must either pay the money to an STO or to the state. *Id.* This also is untrue. Taxpayers have a plethora of options

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[1] Petitioner ACSTO has explained previously that, both factually and legally, tax credits, exemptions, and deductions operate the same, in that none of them transfer a taxpayer's money to the benefitted group. ACSTO Br. 18-19.

on how to spend this money. The taxpayer could take advantage of the dozens of other tax credits available under Arizona law by, for instance, donating to organizations that assist the working poor, A.R.S. § 43-1088; installing solar energy devices, § 43-1083; or donating to support public schools, § 43-1089.01, to name a few. They could also donate to any one (or more) of thousands of 501(c)(3) organizations and take a deduction.

Respondents also claim that because the tax credit can now be taken for donations made through April 15 of the year following the taxable year, the credits are the same as "tax payments" to the IRS. Resp. Br. 28. Their argument is mistaken. First, Respondents assume that every taxpayer waits until April 15 to donate to an STO. But there are no facts to prove that this is the case (nor is it likely), and regardless it is not constitutionally relevant.

Second, Respondents state that for the first thirteen years of the program "it was possible to contend that taxpayers who made payments to STOs contributed at least some of their 'own funds' to the program." Resp. Br. 28. Respondents contend, without any explanation, that the new April 15 deadline transforms what were donations of private funds for thirteen years into "tax payments." *Id.* This is a distinction without a difference and is constitutionally irrelevant.

Respondents' Position Has Dangerous Implications:

The drastic nature of Respondents' theory that collecting less revenue equals spending public funds is demonstrated by the questions that bedevil it. For instance, if taxpayers cannot invoke federal jurisdiction to challenge tax deductions for donations to religious 501(c)(3) organizations, as Respondents appear to concede, Resp. Br. 26 (if Petitioners' description of the program as no different than "other tax credit and deduction programs that allow taxpayers to choose to contribute to religious organizations" was "accurate" then "[R]espondents could not invoke federal jurisdiction to claim that [it violated the Establishment Clause]"), then why can they invoke it to challenge a tax credit for the same donation? If reduced revenue equals government spending, then (at the very least) taxpayers can challenge all deductions, credits, and other government programs that encourage charitable giving, not to mention any legislative decision to tax less than 100% of income.

Further, if tax deductions for donations made directly to a religious, 501(c)(3) school do not violate the Establishment Clause, as Respondents likewise concede, Resp. Br. 26, then why is it unconstitutional for those donations to reach the same religious schools by way of a tax credit that adds two additional layers of attenuation (STOs and parents) between the government and the schools benefitted? Respondents' position is that a tax deduction for a donation given directly to a religious 501(c)(3) school

is constitutional, while a donation to a private, 501(c)(3) STO that gives the donated money to the same religious school only with parental direction is unconstitutional.

Finally, if a taxpayer has the choice to donate to a religious or nonreligious school when taking a deduction, why does he lose that choice, and, even worse, why is he compelled to support schools he does not desire to support, when taking a credit for a donation to an STO? Respondents (wrongly) claim that to satisfy the Establishment Clause, all STOs must provide donations to all schools, religious and nonreligious. But this would seem particularly problematic to Respondents (and their *amici*), since it would require the secular/atheist taxpayer's donation (which Respondents wrongly claim is a "tax payment") to support both secular *and religious* schools.

As this discussion aptly shows, Respondents' view of the facts and law would result in a drastic expansion of the law of taxpayer standing, and turn Establishment Clause jurisprudence on its head. This Court should reject it.

ARGUMENT

I. Respondents' Lack Article III Standing.

Respondents provide little (and sometimes no) response to ACSTO's standing arguments. The response that they do provide is based on mischaracterized facts, misstated law, and conjecture about what this Court thought about

standing where the issue was not raised. Their arguments fail to demonstrate Article III standing.

A. Respondents Concede Their "Third-Party" Status, Thereby Also Conceding That They Have Not Suffered A Direct And Personal Injury.

In addressing this Court's previous ruling in *Hibbs v. Winn*, 542 U.S. 88 (2004), regarding the Tax Injunction Act's applicability to this case, Respondents admit that "[b]oth the Tax Injunction Act jurisdictional objection . . . and the lack of standing objection . . . concern the ability of 'third-party' state taxpayers to challenge the constitutionality of a state's treatment of other taxpayers." Resp. Br. 33. Respondents are correct, and they have no standing because of their third-party status.

To establish taxpayer standing in the Establishment Clause context, a plaintiff must prove (among other things) that "*his tax money* is being extracted and spent" to support religion. *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (emphasis added). This aspect is important because it is precisely what creates the link between his status as a taxpayer and the government's (alleged) spending. Without spending "his tax money," there is no link at all. And without the need to prove such a link, as Respondents seek here, any taxpayer can challenge any legislative decision to collect anything less than 100% of available income. If Respondents' theory does not extend *Flast* beyond recognition, nothing does.

Respondents do not even address this essential element of taxpayer standing, and in previous filings in this Court disavowed that their standing is predicated on any tax imposed on them. *See* ACSTO Br. 19-20. Taxpayer-plaintiffs must allege injury "by virtue of [their] liability for taxes," *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 478 (1982), and here Respondents concede that they cannot do so.

Instead of basing their claim to standing on a direct and personal injury that they have suffered, Respondents instead base it on Arizona's "treatment of other taxpayers." Resp. Br. 33. But like the injury rejected in *Valley Forge*, this injury is based on the "claim that the Constitution has been violated, [and] nothing else." 454 U.S. at 485. Respondents' "injury" is one they "suffer[] in some indefinite way in common with people generally," *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952), and thus is insufficient as a matter of law to establish standing.

B. Respondents' Mischaracterization That The Tax Credit Is A Government Spending Program Does Not Create Standing.

Respondents repeatedly claim that the tax credit is a "legislative spending program." Resp. Br. 38. As discussed *supra*, this claim is false factually, legally, and logically, and should not be accepted by the Court.

Respondents must resort to mischaracterizations of the program so that they may argue that they have standing under *Bowen v. Kendrick*, 487 U.S. 589 (1988). But Respondents' reliance on *Bowen* is misplaced. *Bowen* involved the "disbursement of funds pursuant to Congress' taxing and spending powers," *id.* at 619-20, funds which included monies *collected from the plaintiffs in that case*. Thus, the plaintiffs in *Bowen* established that *their tax dollars* had been extracted and spent to support religion, an essential element of taxpayer standing Respondents cannot prove.

Bowen is also distinguishable because, as this Court recently explained, the statute there appropriated government funds and expressly authorized providing those funds to religious organizations. *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 607 (2007). Here, the statute is neutral as to religion, a fact Respondents concede by "abandoning" their facial claim. Further, as discussed in ACSTO's merits brief at 23-25, the tax credit statute neither appropriates nor spends any government funds, but rather provides a credit to taxpayers who donate their own money to 501(c)(3) organizations.

Respondents try to sidestep this critical distinction by arguing that the tax credit has the same fiscal impact (i.e., a reduction in state revenues) as an appropriation and expenditure of tax revenues. Resp. Br. 30-32.[2] But this argument

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[2] Respondents rely heavily on Arizona Department of Revenue descriptions of the tax credit statute in making this argument

misses the mark for at least two reasons. First, Respondents fail to address the speculative nature of their claim that a tax credit "reduces" revenue. As this Court said of the tax credit in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006), "[t]he very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues." Consistent with *Cuno*, studies have shown that the tuition tax credit reaps savings by reducing the costs of public education, to the tune of millions of dollars. *See* ACSTO Br. 31-32.

Second, Respondents' argument that a tax credit has the same "fiscal impact" as an appropriation and expenditure of tax revenues does not serve to create any of their missing requirements for standing: they cannot show that *their tax dollars* are being spent in support of religion, *Flast*, 392 U.S. at 106, nor does a similar fiscal impact create causation or redressability.

C. Speculation Permeates Respondents' Standing Theory.

As discussed in ACSTO's merits brief, Respondents also cannot establish Article III standing because, under their theory of injury (a reduction in state revenues), each prong of the standing test is speculative. And, as a matter of law,

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Resp. Br. 30-32. But Respondents ignore that those same reports treat deductions and credits the same. Moreover, this Court noted in *Mueller v. Allen*, 463 U.S. 388, 401 n.9 (1983), how such reports are not meant to be an exhaustive analysis of the factual or legal implications of a program.

speculation does "not suffice to invoke the federal judicial power." *Eastern Kentucky Welfare Rights Org. v. Simon*, 426 U.S. 26, 44 (1976).

Respondents' response to the speculative nature of their "injury" is to assert that the tax credit program costs those taxpayers not taking the credit "more than $50 million dollars a year." Resp. Br. 30. But this assertion depends on "speculating that elected officials will increase a taxpayer-Plaintiff's tax bill to make up a deficit," and thus does not "suffice[] to support standing." *Cuno*, 547 U.S. at 344.

Respondents also assert that, because this case is at the motion to dismiss stage, this Court must accept as true their allegation that the state's revenues are reduced by the tax credit. Resp. Br. 42. While Respondents are correct that courts typically defer in this context, the rule does not permit Respondents to make factually and legally incorrect assertions to defeat a motion to dismiss. Here, as discussed *supra* and in ACSTO's merits brief at 31-32, Respondents' claim that state revenues are reduced by the tax credit is speculative both factually and legally, and thus is insufficient to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). It is also critical to note that, whether the tax credit results in less, the same, or more revenue, Respondents' complaint still fails to allege facts sufficient to satisfy Article III standing requirements.

While Respondents at least address the speculative nature of their injury, they simply ignore the speculation that dooms their causation and redress arguments. Respondents' theory of causation is speculative, among other reasons, *see* ACSTO Br. 36-37, because it assumes that state lawmakers increased their tax burden in response to a deficit. *Cuno*, 547 U.S. at 344 ("[f]ederal courts may not assume a particular exercise of . . . state fiscal discretion in establishing standing"). Redress is also speculative under such circumstances. *Id.* ("establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions").

Respondents try to bypass *Cuno*'s rejection of their standing theory by arguing that it does not apply here because it was not an Establishment Clause case. Resp. Br. 36. But this just proves that Respondents seek a free pass on Article III's standing requirements. *Valley Forge* already rejected the argument, which underlies Respondents' position here, that "enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege 'distinct and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted.'" 454 U.S. at 488 (citation omitted).

D. Cases Where The Establishment Clause Merits Were Reached But Standing Was Not Discussed Are Not Precedent For Jurisdiction.

Respondents argue that cases in which this Court reached the merits of an Establishment Clause challenge to tax deductions, credits, and exemptions, but did not discuss standing, support a finding of standing here. Resp. Br. 33, 39. They claim that the Court's silence on the jurisdictional issue in these cases "was almost certainly due to the belief that the issue had been settled." *Id.* at 44.

There are at least two problems with this argument. First, as this Court recently and unanimously stated, it "often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions-even on jurisdictional issues are not binding in future cases that directly raise the questions." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006). Put simply, the Court's silence on jurisdiction is not precedent for jurisdiction. Second, Respondents' contention that parties can divine clear legal rules from this Court's silence has serious practical problems. Indeed, each party would interpret this Court's silence, on any issue, in a favorable way for their case, and there would be no way to prove them wrong. This is precisely what Respondents are doing here.

E. Respondents Do Not Even Address The Important Federalism And Separation Of Powers Considerations Raised By Their Lawsuit.

Respondents nowhere address ACSTO's argument that the principles of federalism and separation of powers favor denying them standing. ACSTO Merits Br. 39-41. Respondents' amici, however, claim that separation of powers does not apply where the federal judiciary reviews the action of a state legislature. AUSCS Br. 21. This cannot be squared with *Cuno*, however, which denied standing where state taxpayers sought review of a state tax credit in federal court in part to avoid "interpose[ing] the federal courts as 'virtually continuing monitors of the wisdom and soundness' of state fiscal administration." 547 U.S. at 346. This is the very concern that animates the separation of powers doctrine. *Allen v. Wright*, 468 U.S. 737, 759-60 (1984).

Respondents' amici further argue that state taxpayers bringing Establishment Clause challenges to state tax policies in federal court should not have to satisfy the "legislative nexus" half of *Flast*'s test. Specifically, they claim that state taxpayers will have difficulty showing that a challenged program is an exercise of the state legislature's taxing and spending power because that power is exercised by more than just the state legislature in many states. AUSCS Br. 19-20. But this is a reason standing should be denied, not a reason half the test should be jettisoned. While this Court has recognized that *Flast* is a narrow exception that has "largely been

confined to its facts," *Hein*, 551 U.S. at 609. Respondents' amici seek to expand it by discarding one of its requirements.

II. Arizona's Tax Credit Does Not Violate The Establishment Clause.

Respondents' approach of twisting the facts to satisfy their erroneous view of the law continues in their discussion of the Establishment Clause merits, as shown below.

A. Respondents Facial And As-Applied Claims Are Indistinguishable.

In their merits brief, Respondents attempt to distinguish their as-applied and facial challenges by claiming that "[i]t was not evident from the text of the original Arizona statute that STOs" could limit scholarships to religious schools. Resp. Br. 11. But Respondents' complaint alleges that the statute, on its face, allows STOs to restrict their scholarships to students attending religious schools. ACSTO Pet. App. 119a. This is consistent with the statute, which expressly allows such limitations, and the majority and dissent in *Kotterman*, both of which found that STOs could limit scholarships to certain schools. *See* ACSTO Br. 48-49. In fact, each aspect of the program that Respondents challenge is contemplated on the face of the statute. Respondents have simply dressed their "abandoned" facial claim in "as-applied" clothing to sidestep *Kotterman*'s holding that the tax credit satisfies *Lemon*.

B. The Tax Credit Serves A Valid Secular Purpose.

Respondents barely discuss whether Arizona's program satisfies the purpose prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and instead assert that it "is not necessary to resolve" the issue. Resp. Br. 51. The Ninth Circuit's analysis of this prong is, in any event, indefensible. The Court determined that the tax credit served a valid secular purpose, ACSTO Pet. App. 18a (purpose was to provide "equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents"), but nonetheless found that an improper purpose could be retroactively imputed to the program based on the actions of private parties using the program after its enactment. No case supports such a rule.

Respondents do claim that the tax credit program, unlike the program upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), "is not supported by any strong educational need." Resp. Br. 24. But this ignores that Arizona's public education system is ranked anywhere between 40th and 49th, depending on the subject.[3] While "strong educational need" is not the only test for determining if the tax credit serves a valid secular

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[3] These rankings can be derived by using the NAEP data tool located at the National Center for Educational Statistics website. NAEP Data Explorer, nces.ed.gov/nationsreportcard/naepdata/dataset.aspx. The reported scores were used to determine state rankings. In 2009, Arizona ranked 47th in fourth grade mathematics; 49th in fourth grade reading; 40th in eighth grade mathematics; and 41st in eighth grade reading.

purpose, *see* ACSTO Br. 49-53, Arizona's low educational ranking even meets Respondents' incorrectly limited standard. Further, this Court has never held that a state must wait for an educational crisis before advancing educational needs.

C. Respondents' Establishment Clause Claims Are Improperly Based On The Actions Of Private Parties.

"For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original). The problem is that Respondents' principal Establishment Clause complaint that scholarship funds are allegedly concentrated in STOs that award scholarships solely to religious schools results from "decisions made by Arizona taxpayers making donations to STOs and by the STOs that receive the payments, rather than by the state legislature." Resp. Br. 17-18. And even after these private decisions are made, a parent must select a school and apply for a scholarship before even a penny goes to a private religious (or nonreligious) school.

This program is plainly constitutional under *Zelman*. There, this Court upheld state disbursed government revenues to religious schools where there was one private actor (parents) breaking the circuit between the government and the benefitted

schools. 536 U.S. at 652. Here, there is no government money involved and there are three private actors taxpayers, nonprofit 501(C)(3) organizations, and parents who are circuit breakers. There is far more attenuation between the government and the benefitted schools here than in *Zelman*, and thus, even more than in *Zelman*, "the Establishment Clause [is] not implicated." *Id.*

To create an Establishment Clause violation where there is none, Respondents again ignore the facts. Although in the court below they "d[id] not argue that STOs are state actors," ACSTO Pet. App. 21a n.10, they now claim that STOs are "acting on behalf of the state" Resp. Br. 3, and that they are "government actors," *id.* at 58 n.12. Respondents raise arguments related to the recent amendments to § 43-1089 in making this claim. They raised the same arguments in their supplemental brief regarding a change in state law, and Petitioner ACSTO relies primarily on its detailed rebuttal of those arguments made in its reply to that brief.

A few points, however, warrant reiteration. Both before and after the revisions to § 43-1089, one critical fact remained constant: an STO must be a "nonprofit organization in [Arizona] that is exempt or has applied for exemption from federal taxation under section 501(c)(3) of the internal revenue code." State App. 9. Despite their private, nonprofit status under federal law, Respondents claim that Arizona's regulation of STOs, including its requirement that they report on their financial condition, turn them into agents of the state. But the requirements

Arizona places on STOs are indistinguishable from, and less onerous than, the typical requirements placed on nonprofit organizations in Arizona, in other states, and at the federal level. ACSTO Supp. Br. 4-9. As with all other nonprofit organizations, STOs do not become state agents simply because they must satisfy reporting requirements.[1]

D. All Private Choices Involved In A Program Are Constitutionally Relevant.

Respondents claim that only the private choice of parents matter under *Zelman*. Resp. Br. 19-20. But neither *Zelman*, nor any other private choice case, so limits the relevant choice. 536 U.S. at 655 (no endorsement concerns where "aid reaches religious schools solely as a result of the numerous independent decisions of private individuals"); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986) (no establishment clause violation where program money "flows to religious institutions . . . only as a result of the genuinely independent and private choices" of program's beneficiaries).

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[1] Likewise, Respondents are wrong that STOs are transformed into state actors because they are established to serve the statutorily-defined purpose of granting educational scholarships. Resp. Br. 3, 27. If this were true, all 501(c)(3) charities would be state actors because corporations seeking federal tax exemption must be established, no different than STOs, to serve one of several purposes set out in 26 U.S.C. § 501(c)(3) (religious, charitable, scientific, testing for public safety, literary, educational, or prevention of cruelty to children or animals, etc).

The relevant private choices are those involved in the particular program under review. Here, private decisions are made by taxpayers, the 501(c)(3) STOs, and parents. These multiple levels of private choice provide significantly more attenuation between the government and the benefitted religious institutions than in any other private choice program upheld by this Court, all of which provided a single layer. *See Zelman*, 536 U.S. at 639; *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 10 (1993); *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 399.

Respondents' argument that only parental choice matters is based partly on their errant claim that STOs and taxpayers are not beneficiaries of Arizona's tax credit, while parents are. Resp. Br. 58. In addition to being wrong as a matter of fact, Respondents directly contradict themselves in making this claim. Respondents treated STOs and taxpayers as beneficiaries when they wanted to paint a skewed picture of the program in which STOs "get rich" (because they are permitted to keep 10% of donations),[5] and taxpayers get to donate

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[5] In making this errant argument about STOs, Respondents also resort to unjustly maligning ACSTO. Respondents complain that ACSTO is "withholding up to 10%" of the donations they receive. Resp. Br. 10. But the law permits a 10% withholding for operating expenses, and, moreover, ACSTO has awarded over 92% of its donations as scholarships (rather than the statutory mandate of 90%) over its lifetime. *See* ACSTO Homepage, *www.acsto.org*. Respondents claim that ACSTO pays "exorbitant salaries" to family and friends. Resp. Br. 10. This is untrue, and the article they cite does not even support this claim. ACSTO does have four employees (fewer than several smaller STOs) which is certainly unsurprising as a 501(c)(3) with a $10 million dollar budget requires several

money "for free."[6] *Id.* at 5, 10. But now, when these arguments do not serve their Establishment Clause purposes, they claim that STOs and taxpayers "are not program beneficiaries." *Id.* at 58. It is also important to note that the same parental choice so critical to a finding of constitutionality in *Zelman* is also present here: no money goes to any private school without a parent choosing that school and applying for a scholarship.

E. Respondents Erroneously Claim That STOs Engage In Religious Discrimination.

It is undisputed that some STOs, like Petitioner ACSTO, support only religious schools; some STOs, like Respondent in support of Petitioners Arizona School Choice Trust, support both religious and

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employees to operate. Further, the salaries ACSTO pays are more than reasonable and comprise under 2% of its annual budget. Respondents claim that there is a lack of emphasis on financial need in awarding scholarships, and that taxpayers allegedly "swap" donations. Resp. Br. 9. But ACSTO's most important factor in awarding scholarships has always been financial need and it has never allowed "swapping." Respondents' accusations and insinuations about ACSTO are mere unsubstantiated distractions.

[6] Respondents claim that donating money to an STO and claiming the credit is not charity because it costs the taxpayer nothing. Resp. Br. 26-27. But the donation does cost the taxpayer money, even if it reduces his tax liability. Further, Respondents' definition of charity is far too cramped, and they cite nothing to support it. Charity is "benevolent goodwill toward or love of humanity: generosity and helpfulness, especially toward the needy . . . ." *Merriam Webster's Collegiate Dictionary* 208 (11th Ed. 2003). Donations to 501(c)(3) corporations, including STOs, certainly fit the bill.

nonreligious schools; and other STOs support only nonreligious schools. ACSTO Br. 5-6. Respondents misrepresent these facts by claiming that STOs which support only religious schools award scholarships "to children . . . on the basis of their religion." Resp. Br. 12. This "discrimination" by STOs, which is a linchpin of Respondents' case, is simply made up.

STOs do not discriminate on the basis of any criteria. They merely associate with private schools of broad stripes, who then decide which students attend. Respondents essentially ask this Court to strike the program because it involves religiously-affiliated institutions, along with nonreligious ones. But this Court has said that a "fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller*, 463 U.S. at 393. And here, government money is not even involved.

F. Respondents Are Wrong That Parents Are Limited In Obtaining Scholarships To Nonreligious Schools.

Respondents also errantly claim that there is not enough scholarship money available for parents seeking scholarships to nonreligious schools. Resp. Br. 52-53.[7] The facts not only do not support this

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[7] Respondents' argument here is based partly on their mistaken view that to satisfy the Establishment Clause the program must "guarantee" that a parent can obtain a scholarship. Resp. Br. 52. But no program upheld by this Court ever guaranteed

claim, but actually show that parents seeking a religious education are more likely to encounter this problem.

Consider the fact that, over the life of the program, the percentage of STOs with no religious affiliation has increased. In 1998-99, when reporting started, 6 of 15 STOs (40%) had no religious affiliation (JA 87-88); in 1999-2000, 20 of 34 STOs (60%) had no religious affiliation (*id.*); and in 2008, 30 of 55 (55%) had no religious affiliation. ASCT Pet. App. 223-24. Thus, within just a year of operation, and from that point forward, STOs with no religious affiliation have constituted a majority of the STO market, even though religious private schools constitute 75% of all private schools. *See* Vicki Murray and Ross Groen, *Survey of Arizona Private Schools: Tuition, Testing, and Curricula*, at 1, Jan. 5, 2005, at 1, www.goldwaterinstitute.org/article/1299.

In addition, the percentage of donations to religiously-affiliated STOs has significantly decreased over the life of the program, starting at 94% in 1998, and dropping to 67% in 2009. ACSTO Br. 62. Juxtapose this with the fact that only 19% of private school students in Arizona are enrolled in nonreligious schools. Cato Br. 25. This means that parents seeking a nonreligious education for their child are nearly twice as likely to obtain a

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that a scholarship or other benefit would be received. *See Zelman*, 536 U.S. at 646 ("families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate").

scholarship as parents seeking a religious education.[8]

G. This Court's Direct Aid Cases Are Inapplicable Here.

Respondents mistakenly rely on this Court's "direct aid" cases, arguing that government funds may not be provided to organizations that are "pervasively sectarian" or that use the funds to "inculcate the views of a particular religious faith." Resp. Br. 55. Respondents allege that STOs fit both descriptions.[9]

The "direct aid" cases are inapplicable here for at least two reasons. First, the tax credit does not involve the disbursement of government funds. Second, this Court "has drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (internal citation omitted). In the latter category, in which this case falls, it is

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[8] In addition to being factually inaccurate, it is also critical that Respondents' "limitations" argument is constitutionally irrelevant because the "limits" complained of are products of private choice, and thus not actionable under the Establishment Clause. *See* ACSTO Br. 57-60.

[9] Recent decisions of this Court shed doubt on the continued viability of the "pervasively sectarian" concept. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow") (plurality).

constitutionally irrelevant whether government aid goes to "pervasively sectarian" schools or is used to inculcate religious beliefs because private choice breaks the circuit between government and religion. *See, e.g., Zobrest*, 509 U.S. at 13 (parents' choice to place state funded sign language interpreter in "pervasively sectarian" Roman Catholic high school did not violate Establishment Clause). Respondents are relying on the wrong legal test to evaluate Arizona's program.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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October 15, 2010

REPLY BRIEF

Nos. 09-987, 09-991

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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1. School Tuition Organizations' Actions Are Not Attributable to the State.

The court of appeals held that Section 1089's private-school-tuition-tax-credit program had the purpose and effect of advancing religion because the State allowed taxpayers to donate to STOs that limit scholarships to religious schools and this would constrain parents' ability to choose a secular private school. Garriott Pet. App. 20a, 22a. In reaching this holding, the court of appeals characterized Section 1089 as "an indirect aid program" and STOs as "private charitable organizations." *Id.* at 21a. Respondents have abandoned their argument that Section 1089 has an improper religious purpose, Resp. Br. 50-51, and do not urge the Court to adopt the lower court's reasoning concerning Section 1089's effect. Instead, Respondents' latest argument depends entirely on whether STOs' decisions that they will provide scholarships only to religious schools are attributable to the State for Establishment Clause purposes: "The controlling issue in the case is whether the program should be treated as a private charitable program, as petitioners contend, or as a government spending program subject to the restrictions of the Establishment Clause." Resp. Br. at 1.[1] Respondents' argument

[1] Respondents' argument is different from their argument in the court of appeals. *See* Garriott Pet. App. 22a n.10 (the court of appeals noted that "Plaintiffs do not argue that STOs are state actors"). Respondents' argument is now based on the argument that STOs are state actors. Resp. Br. at 27 ("STOs are not charities. . . . They disburse . . . state income-tax revenues to

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fails because the STOs' actions that Respondents challenge are not attributable to the State.

This Court has rarely held that "actions of private entities can . . . be regarded as governmental action for constitutional purposes." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995). Even if the State extensively regulates a private entity, the entity's action will not be attributable to the State unless "there is a 'sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)). Normally, the State "can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* The required nexus may also "be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the

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further the state's policy of promoting parental school-choice."). This Court will not ordinarily consider issues that were not raised in or considered by the court of appeals. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Respondents may believe that their new argument is justified because the legislature amended Section 1089 in 2010 after the court of appeals issued its opinion. But the 2010 amendment does not change the provision of Section 1089 that Respondents challenge (Garriott Br. at 4, 10-11), and, as will be discussed *infra*, the amendments do not make STOs state actors.

State.'" *Id.* at 1005 (quoting *Jackson*, 419 U.S. at 353).

Respondents acknowledge that they would not have a valid claim if STOs were private charitable organizations. Resp. Br. at 22, 25-26. However, Respondents argue that the STOs' actions should be attributable to the State because they receive state money, they serve a state purpose, and the State extensively regulates them to ensure compliance with state statutory requirements. Resp. Br. at 25-27. But precisely the same could be said of other section 501(c)(3) organizations that receive contributions from donors who receive a tax deduction, tax credit, or both to further the government's interest in encouraging organizations that serve desirable public purposes and that are regulated to ensure that they actually serve those purposes.[2] Because the State does not encourage or coerce the STO actions that Respondents challenge – *i.e.*, providing scholarships only to religious schools – and the STOs do not exercise powers that are traditionally the State's exclusive prerogative, the STOs' actions, like the actions of other section 501(c)(3) organizations, are not attributable to the State.

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[2] Nonprofit organizations that are organized and operated exclusively for certain purposes, including religious, charitable, scientific, literary, and educational, are entitled to a corporate tax exemption under 26 U.S.C. § 501(c)(3), and individuals who contribute to these organizations are entitled to a deduction under 26 U.S.C. § 170.

Respondents apparently distinguish STOs from other section 501(c)(3) organizations by incorrectly asserting that STOs are funded by state money. Resp. Br. at 27.[3] As the Arizona Supreme Court explained in *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999), the money contributed to STOs is not public money because it never enters the State's control. The court rejected the petitioners' contention that the State "effectively controls and exerts quasi-ownership" over taxpayer money that "*could* enter the treasury if it were not excluded by way of a tax credit":

> [U]nder such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature. . . .
>
> Equally problematic is the fact that petitioners' contention directly contradicts decades-long acceptance of tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions. If credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions. Indeed, it seems to us

[3] Respondents also incorrectly assert that taxpayers cannot and do not contribute to STOs in amounts that exceed the available tax credit amount and that therefore STOs are funded entirely by state money. Resp. Br. at 27. Respondents do not allege this in their complaint, and nothing in the 2010 amendment to Section 1089 precludes STOs from receiving contributions from individuals who do not take a tax credit for the entire amount of their contribution.

> that unless a constitutionally significant difference between credits and deductions can be demonstrated, petitioners' argument must fail.

Id. Like the petitioners in *Kotterman*, Respondents have not provided any authority that supports their argument that there is a distinction between credits and deductions that would justify treating contributions entitled to a tax credit as state money but not treating the benefit received from a tax deduction as state money.

Respondents argue that there is a difference between credits and deductions because taxpayers do not contribute their own money when they receive a dollar-for-dollar tax credit for their contribution. Under Respondents' reasoning, the portion of a contribution that results in the payment of a lower tax because of a tax deduction and the amount saved as the result of an exemption would also be considered state money. But the Court has never held that the money that the government has not collected as a result of tax deductions or tax exemptions is government money. *Cf. Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989) (holding that charitable deductions for contributions to religious organizations did not violate the Establishment Clause); *Walz v. Tax Comm'n*, 490 U.S. 664, 673 (1970) (upholding a tax exemption for property used exclusively for religious

purposes). The difference between tax credits and tax deductions is one of degree and not substance.[4]

Contrary to Respondents' argument, taxpayers who contribute to STOs do make voluntary contributions. Resp. Br. at 27. They are required to pay taxes but the State does not require them to contribute to STOs. All tax benefits, including "exemptions, exclusions, deductions, and credits" are "designed to encourage certain kinds of activity or to aid taxpayers in certain categories." Ariz. Dep't of Revenue, *The Revenue Impact of Arizona's Tax Expenditures FY 2008/2009*, at 1 (Nov. 16, 2009, Preliminary) (hereinafter *Tax Expenditure Report FY 2008/2009*).[5] Under Arizona law, taxpayers may pay either the amount of their income-tax liability or reduce that amount by choosing to receive a credit for contributing to a large variety of organizations. *See id.* at 45-48 (listing twenty-eight different tax credits, including the private-school-tuition-organization credit). Arizona taxpayers may

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[4] Indeed, because tax deductions primarily benefit high-income taxpayers, thereby enabling them to have a disproportionate impact on which charitable organizations receive contributions and on the amount of contributions that they receive, many tax scholars favor tax-relief mechanisms such as tax credits over tax deductions. Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 Ind. L.J. 1047, 1057-58 & n.39 (2009); *see also* Brian H. Jenn, *The Case for Tax Credits*, 61 Tax. Law. 549, 556 (2008) (noting that tax deductions are inequitable because "the deduction is worth more to the higher-income taxpayer than the lower-income taxpayer").

[5] This report is available at http://azdor.gov/ReportsResearch/TaxExpenditures.aspx.

also take a deduction for contributions to section 501(c)(3) organizations other than STOs[5] and the Arizona Department of Revenue estimated the value of the deductions that they took in 2005 for contributions to section 501(c)(3) organizations to be approximately $141 million.[6] Ariz. Dep't of Revenue, *The Revenue Impact of Arizona's Tax Expenditures FY 2006/2007*, at 58 (Sept. 2010) (hereinafter *Tax Expenditures Report FY 2006/2007*).[7] But whether a taxpayer receives a credit or a deduction for her donation, the decision to contribute remains voluntary.

Even if the private contributions to STOs could be characterized as state money, the STOs' decisions to provide scholarships only to religious schools could not be characterized as state action because private individuals make those decisions without any state influence or coercion. This Court has held that the decisions of private entities that receive virtually all of their funding from the State are not attributable to the State unless the State coerces or strongly encourages the challenged decision. *See Rendall-Baker v. Kohn*, 457 U.S. 830, 840-42 (1982) (teachers'

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[5] Arizona taxpayers can take a state tax deduction for their contributions to STOs if they have not received a credit for the amounts contributed. *See* A.R.S. § 43-1089(E) (2010) (Garriott Br. App. 6).

[6] The estimated value of the deductions for tax years after 2005 are not yet available. *Id.*

[7] This report is available at http://azdor.gov/ReportsResearch/TaxExpenditures.aspx.

discharges from a private school were not attributable to the State even though virtually all of the school's income was derived from government funding because the decisions to discharge the teachers "were not compelled or even influenced by any state regulation"); *Blum*, 457 U.S. at 1011 (rejecting nursing home residents' due process claims against state officials even though the State subsidized the nursing homes' operating and capital costs by paying the medical expenses of more than ninety percent of the nursing homes' patients because the State was not responsible for the nursing homes' decisions to discharge patients).

Respondents also argue that STOs are not private charitable organizations because they "serve the state's purpose of enhancing school-choice opportunities for Arizona parents." Resp. Br. at 26.[7] But this

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[7] Respondents attach significance to the change from describing an STO as a "charitable organization" in A.R.S. § 43-1089(G)(3) (2009) (Garriott Pet. App. 120a) to describing an STO as a "nonprofit organization" in A.R.S. § 43-1602(A) (2010) (Garriot Br. App. 9). This change is insignificant because the legislature continues to require STOs to be exempt from federal taxation under 26 U.S.C. § 501(c)(3). *Compare* A.R.S. § 43-1089(G)(3) (2009) *with* A.R.S. § 43-1602(A) (2010). Qualifying purposes under section 501(c)(3) include religious, charitable, scientific, literary, and educational purposes. 26 U.S.C. § 501(c)(3). However, all of those purposes are considered "charitable purposes." *See Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (Congress intended that the entitlement to a tax exemption under section 501(c)(3) "depends on meeting certain common law standards of charity — namely, that an institution seeking tax-exempt status must serve a public purpose and not

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Court has not held that a private entity's actions are attributable to the State even when the entity receives virtually all of its funding from the State and performs a public function. In *Rendall-Baker*, the Court observed that there was no doubt that "education of maladjusted high school students is a public function" and that the legislature had intended to pay for the services, but held that the private school that performed this public function was not a state actor because this function had not been "'traditionally the *exclusive* prerogative of the State.'" 457 U.S. at 842 (quoting *Jackson*, 419 U.S. at 353). Respondents have not demonstrated that providing scholarships to students attending private schools is traditionally the State's exclusive prerogative. To the contrary, this function has traditionally been performed by private organizations. *See* Br. Amici Curiae of United States Conference of Catholic Bishops, et al., in Support of Petitioners at 13.

Respondents also argue that STOs are state actors because the 2010 amendment to Section 1089 increased the State's regulatory authority over STOs. Resp. Br. at 21-22, 29. The 2010 amendment does subject STOs to increased state supervision and does require them to include more information in their

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be contrary to established public policy"); *see also Tax Expenditures Report FY 2006/2007* at 58 (describing deductions that "were allowed for contributions to religious, charitable, educational, scientific or literary organizations" as the "[c]haritable [c]ontribution [d]eduction").

annual reports to the Department of Revenue. *See* Resp. Br. at 10-11 & App. 4-17. But the increased regulation and reporting requirements further the legislative goal of making STOs more accountable and transparent.[10] *See* Garriott's Reply to Resp. Supp. Br. at 4-8 (explaining that the amendment's purpose was to increase accountability and transparency and describing how the amendment furthered that goal). The 2010 amendment does not change the fundamental characteristics of STOs that make them private organizations that the State regulates rather than state agencies. Under the 2010 amendment, private individuals continue to form STOs as section 501(c)(3) organizations that determine to whom and under what standards they will award scholarships to designated private schools. The additional state regulation that the amendment imposes on STOs is "no different than, and in many instances less demanding than, the requirements already imposed on STOs as 501(c)(3) nonprofit corporations at both the state and federal level." Pet. Arizona Christian School Tuition Organization's (ACSTO's) Reply to Resp. Supp. Br. at 5-8 (discussing federal and state requirements imposed on section 501(c)(3) organizations and other nonprofit organizations).

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[10] It is ironic that Respondents complained vehemently about the STOs not being sufficiently regulated until the legislature responded to the criticism by amending Section 1089. Resp. Br. in Opp. at 8-12, but now object to the increased regulation.

Even extensive state regulation of a business "does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson*, 419 U.S. at 350. In *Jackson*, the Court held that a private utility's termination of a customer's electricity was not state action because there was not a sufficiently close nexus between the State and the decision to terminate: "Respondent's exercise of choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Id.* at 457 (footnote omitted). Here, the decision of some STOs to provide scholarships only to religious schools cannot be attributed to Arizona because it does not regulate those choices.

Finally, without specifically arguing it, Respondents suggest that Arizona's relationship to the STOs is comparable to the government's relationship to a government-created and -controlled corporation such as Amtrak. Resp. Br. at 58 n.12 (citing *Lebron*, 513 U.S. at 378, 397). In *Lebron*, the Court held that Amtrak was part of the government for First Amendment purposes because the government "create[d] the corporation by a special law, for furtherance of governmental objectives, and retain[ed] for itself permanent authority to appoint a majority of the directors of that corporation." 513 U.S. at 400. Of course, STOs are nothing like Amtrak – not because there are more than fifty of them – but because Arizona does not create them and does not control their operation either by holding an ownership

interest in them or by appointing the members of their boards of directors.

II. Respondents' Standing Analysis Is Faulty Because They Incorrectly Characterize Section 1089 as a Government Spending Program.

Respondents' argument that they have standing under *Flast v. Cohen*, 392 U.S. 83 (1968), fails to the extent that they rely on their characterization of Section 1089 as a direct government spending program that is like the program in *Bowen v. Kendrick*, 487 U.S. 589 (1988). *See* Resp. Br. at 40-42.[11] Both *Flast* and *Bowen* involved governmental grants that were provided directly to religious organizations. *See Flast*, 392 U.S. at 86-87, 91 n.3 (federal taxpayers challenged a congressional enactment that required federal officials to provide federal funds to the State to provide services and resources to educationally deprived students in private schools, including religious schools); *Bowen*, 487 U.S. at 597 (federal taxpayers challenged the Adolescent Family Life Act, which provided federal funds to a number of grantees with institutional ties to religious denominations). In contrast to the grant programs in *Flast* and *Bowen*,

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[11] Although Petitioner Garriott did not address standing in his opening merits brief, he addresses it briefly in this reply because Respondents for the first time base their standing argument on their mischaracterization of Section 1089 as a direct government spending program.

Section 1089 does not disburse government funds and does not direct the transfer of government money to religious institutions. It instead provides a tax benefit to private individuals who voluntarily donate money to the STO of their own choosing.[11]

Respondents also place substantial reliance on this Court's decisions that addressed taxpayer Establishment Clause challenges to tax benefit plans without addressing standing, such as *Mueller v. Allen*, 463 U.S. 388 (1983), and *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and on the Court's failure to raise standing in *Hibbs v. Winn*, 542 U.S. 88 (2004). Resp. Br. at 32-35.[12] But the Court is not bound by these cases

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[11] Respondents also err in equating the harm from a tax benefit to the harm from a direct grant by relying on the Arizona Department of Revenue's estimate of the revenue lost as a result of the private-school-tuition-organization credit. *See* Resp. Br. at 32 (citing *Tax Expenditures Report FY 2008/2009*, at 48). The Department of Revenue acknowledges that the total value is "only a general guide and should not be used in isolation from the rest of the expenditure amounts," *Tax Expenditure Report FY 2008/2009*, at 1, and makes no attempt to determine if the State saves money because it does not pay for the education of private school students. As this Court has noted, it is not clear whether tax breaks deplete the treasury. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) ("The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues.").

[12] Respondents incorrectly assert that the United States did not mention standing in its amicus brief in *Hibbs*. Resp. Br. at 15, 33. The United States noted that "[w]hether the challenge to the state credit in this case falls within the scope of those decisions [*Flast* and *Valley Forge Christian College v. Americans*

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because it did not address standing in them. *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *see also Flast*, 392 U.S. at 92 n.5 (noting that the Court had accepted jurisdiction in taxpayer suits without passing directly on the standing question in at least three cases prior to deciding that the taxpayers did not have standing in *Frothingham v. Mellon*, 262 U.S. 447 (1923)). Now that the standing issue is squarely before the Court, it should consider whether direct governmental expenditures are different from indirect tax benefits for purposes of taxpayer standing as well as for purposes of determining the merits of Establishment Clause challenges. *See Walz*, 397 U.S. at 690 (Brennan, J., concurring) (noting that tax exemptions and general subsidies provide economic assistance in "fundamentally different ways" because "[a] subsidy involves the direct transfer of public money to the subsidized enterprise and uses resources exacted from taxpayers as a whole" but "[a]n exemption . . . involves no such transfer").

United for Separation of Church & State, Inc., 454 U.S. 464 (1982)], or otherwise satisfies the Article III standing requirement (*see Doremus v. Board of Education*, 342 U.S. 429, 434-435 (1952)), was not raised or addressed below." Br. for the United States as Amicus Curiae Supporting Petitioner at 3 n.1, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809).

III. Section 1089 Does Not Violate the Establishment Clause.

Respondents base their argument that Arizona's program violates the Establishment Clause on their distorted characterization of the holding in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and their mischaracterization of Section 1089 as a direct aid program. Their argument also ignores *Hernandez v. Commissioner*, 490 U.S. 680 (1989), and *Walz*, which are clearly relevant because they, like this case, address whether tax benefits violate the Establishment Clause. This Court should reject Respondents' argument because it is contrary to the Court's precedents.

A. Section 1089 Does Not Violate the Principles that *Zelman* Established.

Respondents argue that Section 1089 violates *Zelman*'s principles because it is not neutral with respect to religion and it does not provide parents with true private choice. Resp. Br. at 50-52. Respondents' argument fails because it is based on their mischaracterization of STOs as state actors and it ignores the public school options available to Arizona parents and the constraints on parental choice in *Zelman*.

Respondents argue that under *Zelman*, "'the circuit between government and religion [is] broken, and the Establishment Clause [is] not implicated'" only when the government provides aid to parents on a religiously neutral basis. Resp. Br. at 49 (quoting *Zelman*, 536 U.S. at 652). But *Zelman*'s core principle

is that there is no Establishment Clause violation when "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." 536 U.S. at 649. Such private choices break "the circuit between government and religion." *Id.* at 652.

Under Section 1089, government aid reaches religious schools as a result of private individuals' genuine and independent choices – the choices of individuals who establish STOs, the choices of individuals who contribute to STOs, and the choices of parents who seek STO scholarships. Although the private choices that broke the circuit in *Zelman* were the parents' choices of the schools at which to use the vouchers, nothing in *Zelman* suggested that the only permissible circuit breaker in an indirect government aid program is parental choice. Section 1089 is a program of true private choice under *Zelman* because more private choices break the circuit between the State and any aid that flows to religion under it than under the *Zelman* program and the State does not influence any of those private choices in favor of religion.

Respondents argue that Section 1089 is not neutral with respect to religion because "more than half of its scholarships are awarded to parents and children on the basis of their religion." Resp. Br. at 51.[11] Respondents thus equate the individual

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[11] This assertion demonstrates a shift in Respondents' argument, and it is not supported by Respondents' complaint or

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taxpayer choices about which STOs to support and the individual STO decisions concerning which schools to support by providing scholarships with state action. But taxpayers' decisions to contribute to STOs and STOs' decisions to support religious schools are fully private choices for Establishment Clause analysis purposes. And *Zelman* does not provide authority for attributing private choices to the State. Instead, the Court concluded that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652.

In *Zelman*, the private actions of those individuals who chose to operate and support private schools and chose to participate in the voucher program constrained the choices of families who were deciding whether to use the vouchers at religious or secular schools. The *Zelman* plaintiffs and Justice Souter's dissent objected to the Cleveland voucher program because eighty-two percent of the private schools participating in the program were religious. 536 U.S.

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any other fact in the record. Respondents' complaint alleges that STOs that provide scholarships only to religious schools awarded a majority of the scholarships in the program's first year of operation and that STOs "may restrict their grants of State funds only to children of a specific religious denomination." ACSTO's Pet. App. 119a, 122a. There is no basis for Respondents' assumption herein that a majority of religious STOs and private schools discriminate based on religion.

at 703 (Souter, J., dissenting) (stating that forty-six of the fifty-six private schools in the district were religious). The Court refused to attribute constitutional significance to this figure because the preponderance of religiously affiliated private schools in Cleveland did not arise as a result of the program and because attributing constitutional significance to it would have had "the absurd result" of making "a neutral school-choice program . . . permissible in some parts of Ohio, . . . where a lower percentage of private schools are religious schools." *Id.* at 657; *see also Mueller*, 463 U.S. at 401 (noting that the Court would not "adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law" because such an approach would not provide certainty and would be impossible to administer). The preponderance of religiously affiliated private schools in Arizona, like the preponderance of such schools in *Zelman*, did not arise because of the challenged program. *Compare Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting) (noting that at least seventy-two of Arizona's private schools were religious before Section 1089 went into effect) *with* Vicki Murray, Goldwater Inst. Report No. 199, *Survey of Arizona Private Schools: Tuition, Testing and Curricula*, at 1 (2005) (noting that seventy-five percent of the private schools that participated in the survey in 2004 were religious).[1]

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[1] The percentage of religiously affiliated private schools in Arizona is not significantly different from the percentage of

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Moreover, Respondents' disdain for Section 1089's structure, which allows taxpayers and STOs to choose how money that is contributed as a result of the tax credit is ultimately distributed, is contrary to *Zelman*'s principles concerning private choice. For example, Justice Souter objected to the Cleveland program because religious schools allegedly had an advantage due to, among other things, "donations of the faithful." 536 U.S. at 705 n.15 (Souter, J., dissenting). The Court rejected the notion that the religious schools had an advantage, pointing out that nonreligious schools can receive the same assistance if people want to give it to them. *Id.* at 658 n.4 (noting "that nonreligious private schools operating in Cleveland also seek and receive substantial third-party contributions" and that "several *nonreligious* schools have been created" since the voucher program began). Section 1089 provides exactly the same incentive to taxpayers who favor private secular schools as it does to those who favor private religious schools. Taxpayers who want to contribute to private secular schools can form STOs limited to that purpose, contribute to them, and receive tax credits. Nothing in the program's terms or structure discourages them from doing so.

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religiously affiliated private schools nationwide. U.S. Dep't of Educ., *Private School Universe Survey: 2007-2008*, at 2 (2009) *available at* http://nces.ed.gov/pubs2009/2009313.pdf) (stating that 67.9% of private schools, enrolling 80.6% of private school students, had a religious orientation or purpose).

Respondents also argue that Section 1089 is contrary to *Zelman* because parents do not have a "'genuine and independent' choice about where to use scholarships." Resp. Br. 52 (quoting *Zelman*, 536 U.S. at 649). But Respondents steadfastly ignore the Court's admonition that the Establishment Clause question of whether a state program is favoring religion "must be answered by evaluating *all* the options [that a State] provides [its] schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." *Zelman*, 536 U.S. at 655-56. As Petitioners explained, Arizona provides a host of secular educational options to Arizona students. *See* Garriott Br. at 36-39; ASCTO Br. at 56-57; *see also* Resp. (Arizona School Choice Trust, et al.) Br. in Support of Petitioners at 39-43.

Respondents complain that Section 1089 helps only a very small group of students. Resp. Br. at 46-47. But they fail to acknowledge that the vast majority of Arizona parents choose to send their children to public schools because the public schools are free and provide a variety of options from which to choose. Apparently, Respondents do not suggest that Arizona is coercing or influencing anyone to choose a religious school over a secular one; instead, they are not comfortable with any indirect aid – which they mischaracterize as direct aid – going to religious STOs. But such a principle is inconsistent with the Court's precedents. And Respondents do not explain how eliminating the tax credit will enhance parental choice.

Respondents also fail to address *Hernandez* and *Walz*. In *Hernandez*, 490 U.S. at 696, this Court

upheld the deduction for contributions to charitable entities, including religious organizations, provided by 26 U.S.C. § 170. The Court found that the deduction did not have the primary effect of advancing or inhibiting religion. *Id.* In *Walz*, 397 U.S. at 673, this Court held that New York's property tax exemption for nonprofit organizations, including churches, did not violate the Establishment Clause. Respondents acknowledge that the tax credit here is like the deduction in *Mueller* and the tax exemption in *Walz* when they urge the Court to find that they have standing. Resp. Br. at 35. But Respondents do not explain why allowing deductions for contributions to religious organizations and exemptions for religious organizations themselves does not convert the amount of the tax benefit in question into state funds for Establishment Clause purposes, but allowing credits for contributions to religious organizations does convert the amount of the credit into state funds for the same purposes. As discussed above, there is no constitutional basis for the distinction.[10]

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[10] Amici Curiae criticize Section 1089 because no credit is available to offset the tuition that students must pay if they wish to transfer to a different public school district. Br. of Amici Curiae National School Boards Association, et al., in Support of Respondents at 17-18 & n.5. Because Arizona school districts do not charge tuition to students who are Arizona residents but live outside their districts, A.R.S. § 15-816.01, there is no need for a credit for payment of public school tuition. And Arizona provides a tax credit for contributions to public schools to pay for expenses related to extracurricular activities or character-education programs. A.R.S. § 43-1089.01.

B. Section 1089 Is Not a Direct Aid Program.

Respondents argue that Section 1089, as applied, is unconstitutional under *Bowen v. Kendrick*, 487 U.S. 589 (1988). Resp. Br. at 56-57. Section 1089 is not unconstitutional under *Bowen* because neither the State nor any state official directs state funds to religious organizations under Section 1089.

Bowen involved an Establishment Clause challenge to the direct aid program that Congress mandated in the Adolescent Family Life Act (AFLA). 487 U.S. at 593 ("[T]he AFLA is essentially a scheme for providing grants to public or nonprofit private organizations or agencies for services and research in the area of premarital adolescent sexual relations and pregnancy.") (internal quotation marks omitted). A statute mandating direct aid has the effect of advancing religion on its face when "the statute directs government aid to pervasively sectarian institutions." *Id.* at 610. Although the Court found that the AFLA was not unconstitutional on its face because it did not direct federal funds to pervasively sectarian religious institutions, it held that the AFLA could be unconstitutional, as applied, if the Secretary of Human and Health Services approved federal grants to pervasively sectarian religious institutions. *Id.* at 621-22.

As this Court explained in *Zelman*, its "decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which

government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." 536 U.S. at 649 (internal citations omitted). Because taxpayers who contribute to STOs are not the State, but are private individuals exercising private choice, and STOs are private organizations that are also exercising private choice, Section 1089 is a program of true private choice and not a direct aid program.[17]

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[17] Although the court of appeals erroneously found that parents might believe that Section 1089 favored religion, it correctly found that *Bowen* did not apply because Section 1089 is "an indirect aid program" and "STOs are private charitable organizations." Garriott Pet. App. 21a.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, this Court should reverse the court of appeals' decision.

Respectfully submitted,

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REPLY BRIEF

Nos. 09-987, 09-991

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR RESPONDENTS SUPPORTING PETITIONERS

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REPLY BRIEF FOR RESPONDENTS SUPPORTING PETITIONERS

The constitutional question in this case is whether Arizona's Scholarship Program (the "Scholarship Program"), A.R.S. § 43-1089, is a program of true private choice. When private choices direct the flow of money in an educational aid program, "'no imprimatur of *state* approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002) (quoting *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (emphasis added)). When educational aid reaches schools only as a result of true private choice—as it does in the Scholarship Program—then the *government* does not skew incentives toward religious schools and "the program [will therefore] survive scrutiny under the Establishment Clause." *Id.*

The Scholarship Program is plainly one in which educational aid reaches schools only through the "genuine and independent choices of private individuals." *Id.* at 649. Any individual can create a School Tuition Organization. Any individual can contribute to any School Tuition Organization and claim the tax credit. And any individual can apply for any scholarship offered by any School Tuition Organization. The state has no involvement beyond "making tax credits available. After that, the government takes its hands off the wheel." *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 660 (9th Cir. 2009) (O'Scannlain, J., dissenting from order denying rehearing en banc).

Because the Scholarship Program is one of true private choice, it simply does not implicate the Establishment Clause, which was designed to prevent government endorsement of religion, not limit educational options for parents. *See Zelman*, 536 U.S. at 647, 652. The Ninth Circuit's contrary decision was erroneous and should be reversed.

ARGUMENT

The First Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment, is concerned with whether the Scholarship Program constitutes impermissible *governmental* advancement or endorsement of religion. Programs that permit families to freely and independently use educational aid to attend religious institutions do not offend the Establishment Clause. Therefore, the constitutional question in this case is whether the Scholarship Program is an educational aid program of genuine private choice.

Private choice is the defining characteristic of Arizona's tax credit program. Private individuals choose to set up scholarship organizations. Private individuals freely decide which organizations they donate to. And parents make the choice where to enroll their children. Under these circumstances, "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous

independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Zelman*, 536 U.S. at 655.

The Court's "decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citations omitted). Starting with *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (upholding use of public funds to transport children to religious schools that provide them with religious instruction), the Court has consistently rejected Establishment Clause challenges to indirect educational aid programs that are based on private, individual choice. The Court has not only rejected those challenges but has held that such programs do not even *implicate* the Establishment Clause. *Zelman*, 536 U.S. at 649. Indeed, the Court has "never found a program of true private choice to offend the Establishment Clause." *Id.* at 653.

I. ARIZONA'S SCHOLARSHIP PROGRAM IS A PROGRAM OF GENUINE PRIVATE CHOICE AND THEREFORE DOES NOT IMPLICATE THE ESTABLISHMENT CLAUSE.

The Court has "consistently held that government programs that neutrally provide benefits to a

broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may receive an attenuated financial benefit." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). The Scholarship Program allows any Arizona taxpayer to donate to any School Tuition Organization and claim a tax credit. It also allows any parent to apply to any School Tuition Organization for a scholarship to any private school funded by that organization.

Respondent Taxpayers concede that the Scholarship Program is facially neutral with regard to religion. Winn Br. 3. They also concede that it "is neutral with respect to the taxpayers who direct money to [School Tuition Organizations] . . . [meaning that] the program's aid that reaches a [School Tuition Organization] does so only as a result of the genuine and independent choice of an Arizona taxpayer." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1018 (9th Cir. 2009).

The Scholarship Program offers taxpayers a genuine choice of which School Tuition Organizations they donate to and parents a genuine choice of where to enroll their children. Yet Respondent Taxpayers continue to press their argument that the program violates the Establishment Clause. Their argument hinges on three erroneous premises. First, that School Tuition Organizations are state actors merely because the scholarships they award to families are "subsidized" by the state and because those organizations are subject to regulations designed to prevent

fraud and abuse. Second, that the program skews parents' choices toward religious schools despite genuine private choice. And third, that the same constitutional limitations that apply to direct aid programs also apply to indirect aid programs.

A. School Tuition Organizations Are Not Government Actors.

Respondent Taxpayers' overarching theme is that School Tuition Organizations are creatures of the state, and are established and supervised by the state to administer what Respondents persistently mischaracterize as a "government spending program." Winn Br. 1. But School Tuition Organizations are privately created and privately controlled. They are not government actors. They are private actors. Neither the receipt of government "subsidized" scholarship funds nor being subject to modest government regulation transform these private entities into state actors.

1. School Tuition Organizations Are Privately Created.

School Tuition Organizations are privately created nonprofit organizations permitted by federal law to receive tax-deductible contributions and by state law to receive tax-credit-eligible donations. The government did not create School Tuition Organizations. The first School Tuition Organization to open its doors in Arizona was the Arizona School Choice

Trust, one of the Respondents in Support of Petitioners. The School Choice Trust was privately founded five years before Arizona authorized a tax credit for contributions to such organizations. Ariz. Sch. Choice Trust, *Arizona School Choice Trust was founded for educational opportunity for low-income families*, http://www.asct.org/Founders.shtml (last visited Oct. 13, 2010). Thus, when Arizona enacted the Scholarship Program, it was not creating a new type of charitable work or entity, but rather it was recognizing the valuable work being done by the School Choice Trust in expanding parental options in education to include private schools. This underscores the Legislature's purpose for enacting the Scholarship Program: its legitimate interests in giving parents educational choice. There was no improper religious motivation.

There are a few specific requirements School Tuition Organizations must satisfy in order to receive tax-credit-eligible contributions. A.R.S. § 43-1602(A); Dennard App.[1] 6a-7a; A.R.S. § 43-1603; Dennard App. 9a-11a. These requirements are: (1) the organization is exempt from federal taxation under 26 U.S.C.

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[1] "Dennard App." refers to the Appendix to Brief of Respondents in Support of Petitioners filed by Glenn Dennard, Luis Moscoso, and the Arizona School Choice Trust ("Dennard Br."). Their Appendix refers to A.R.S. § 43-1601, *et seq.*, as A.R.S. § 1501, *et seq.* due to statutory renumbering that took place after the bill's adoption. Memorandum from Holly B. Hunnicutt, Ariz. Leg. Counsel (June 24, 2010), *available at* http://www.azleg.gov/alisPDFs/council/2010%20Renumbering%20memo.pdf.

§ 501(c)(3), A.R.S. § 43-1602(A); Dennard App. 6a-7a; (2) the organization allocate at least 90 percent of its annual revenue for education scholarships, A.R.S. § 43-1603(B)(1); Dennard App. 9a; (3) the organization does not limit its scholarships to students of only one school, A.R.S. § 43-1603(B)(2); Dennard App. 10a; (4) the organization does not award scholarships based solely on donor recommendations, A.R.S. § 43-1603(B)(3); Dennard App. 10a; and (5) the organization does not knowingly allow taxpayers to "swap" donations in an effort to benefit their own children, A.R.S. § 43-1603(B)(4); Dennard App. 10a. These requirements ensure that contributions to School Tuition Organizations benefit the general public and not individual taxpayers.

The Department of Revenue requires any School Tuition Organization desiring to receive tax-credit-eligible donations to certify on a preapproved form that it satisfies these requirements. Ariz. Dept. of Revenue, *A Manual for School Tuition Organizations* 29 Attach. 1 (Aug. 23, 2010), *available at* http://www.azdor.gov/LinkClick.aspx?fileticket=CKeT5ZKMobY%3d&tabid=240. There is no annual recertification requirement. *Id.* at 3. The Department may "decertify" School Tuition Organizations that fail to comply with these requirements, but contributions to decertified organizations would still be eligible for a federal tax deduction so long as the organization remains a federally-recognized 501(c)(3) organization.

That contributions to non-state certified School Tuition Organizations are still federally tax-deductible underscores the fact that, while quantitatively different, other types of tax-reducing mechanisms—such as tax deductions, tax exemptions, and tax credits of less than 100 percent—are qualitatively the same as the tax credit at issue in this case.

The comparative value of a tax benefit to the taxpayer is a function of whether the taxpayer has taxable income and owes taxes, as well as the marginal tax rate on the income. As the marginal tax rate climbs, the quantitative distinction between the effect of 100 percent credits and deductions fades. *See Freedom from Religion Found. v. Geithner*, NO. CIV. 2:09-2891 WBS DAD, 2010 U.S. Dist. LEXIS 50113, at *16-17 (E.D. Cal. May 21, 2010) (finding no "meaningful distinction between tax deductions or exclusions and tax credits" because even though they "do not create dollar-for-dollar reductions in tax liability . . . they reduce tax liability by a percentage directly related to one's income tax bracket.").

Establishment Clause analysis cannot be driven by the percentage of return (100 percent v. 99 percent v. 90 percent v. 50 percent v. 1 percent) on contribution. *See Mueller*, 463 U.S. at 390 (rejecting Establishment Clause challenge to tax deduction for tuition paid to religious private schools); *see also Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (rejecting Establishment Clause challenge to property tax exemption to religious organizations for property used for religious purposes). It is thus irrelevant to the constitutional

analysis whether the benefit is a 100 percent tax credit, a tax deduction, or an exemption.

Finally, Respondent Taxpayers assert that, pursuant to Arizona's recent legislative amendments, contributions to School Tuition Organizations are no longer "charitable donations" because the statute no longer refers to them as "charitable organizations," but rather as "nonprofit organizations." Under § 501(c)(3), "charitable" organizations are but one of a number of nonprofit organizations qualified to receive tax deductible contributions—other types include those organized for "religious," "educational" and "scientific" purposes. 26 U.S.C. § 501(c)(3). Debating whether School Tuition Organizations are best described as "charitable," "educational," or even "religious" organizations is a debate over inconsequential semantics.

2. School Tuition Organizations Operate Independently From Any Government Official.

"[A] State normally can be held responsible for a private decision *only* when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (holding that private nursing homes that received reimbursement from the Medicaid program were not state actors); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)

(holding that private schools funded almost entirely by reimbursement payments from the state for providing special education services to publicly placed students were not state actors). In this case, the state does not control any decisions made under the Scholarship Program. The state has nothing to do with the scholarship-granting decisions made by School Tuition Organizations. As the Ninth Circuit explained, "Arizona does not specify scholarship eligibility criteria or dictate how [School Tuition Organizations] choose the students who receive scholarships." *Winn*, 562 F.3d at 1006. And the Respondent Taxpayers *concede* that "[School Tuition Organizations] are free to award scholarships . . . to students chosen by them, according to their standards, from among all the school-age children in Arizona." Winn Br. 46. Such unrestricted freedom is a far cry from coercive state action.

In the clear absence of any overt state effort to advance religion, Respondent Taxpayers essentially urge the Court to find covert action in the fact that the Department of Revenue "allows" School Tuition Organizations to award scholarships only to the

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[1] The recent legislative amendments to the program did add a requirement that School Tuition Organizations "shall consider the financial need of applicants" and prohibits donors from designating particular students as a condition of contributing to a School Tuition Organization. A.R.S. § 43-1603.B.(4), (D.2); Dennard App. 10a-11a, but that does not alter the fact that scholarship award decisions remain in the hands of School Tuition Organizations.

private schools of their own choosing. But there is nothing suspicious or untoward about this; to the contrary, it is merely implementation of the law as written. It was plainly evident from the text of the original statute—and it is clear from the statute that will go into effect January 1, 2011—that a School Tuition Organization can restrict the total number of private schools to which it awards scholarships, so long as it does not award scholarships to only one school. *Hibbs v. Winn*, 542 U.S. 88, 95 (2004) (explaining that School Tuition Organizations "must designate at least two schools whose students will receive funds."); *Kotterman v. Killian*, 972 P.2d 606, 626 (Ariz. 1999) (Feldman, J., dissenting) ("[A] group of taxpayers who subscribe to a particular religion may form a[] [School Tuition Organization] that will support only schools of that religion."). Indeed, Respondent Taxpayers concede that "from the inception" of the program, School Tuition Organizations have been permitted to restrict scholarships only to particular religious schools. Winn Br. 11. There is no state coercion in giving School Tuition Organizations the freedom to award scholarships to particular types of schools.

School Tuition Organizations make private, independent decisions to serve different constituencies and organize themselves along a number of different lines and concerns, including religious, geographic, pedagogical, and economic. The state neither encourages nor discourages any particular type of School Tuition Organization. Rather, the state, in purely

ministerial fashion, simply ensures that each organization satisfies the criteria discussed in section I.A. above—nothing more. This minor regulatory role does not transform School Tuition Organizations' activities into state action. *Blum*, 475 U.S. at 1004-05 ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.") (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978) and *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974)). The state plays no role in the scholarship-granting decisions of School Tuition Organizations.

3. The Receipt Of Tax-Credit-Eligible Contributions Does Not Transform School Tuition Organizations Into State Actors.

Respondent Taxpayers argue that because contributions to School Tuition Organizations are eligible for a 100 percent tax credit, up to the modest limit of $500 per individual or $1,000 per married couple filing jointly, those contributions are the equivalent of state income tax revenues and that they should be considered state "expenditures." Winn Br. 6. On one side of the ledger, the Scholarship Program does reduce state revenues. On the other side of the ledger are the savings the state realizes from being relieved of the duty to pay for participating children's educations. *See* Ronald J. Hansen, *Private school tax credits save $8.3 million*, Arizona Republic, Oct. 20, 2009.

Though the precise dollar amount of savings to the state is a subject of debate, the fact that the program ultimately saves the state money makes it difficult to characterize it as a state spending program.

Even if the Court were to decide that tax-credit-eligible contributions constitute a form of state "expenditures," the fact that the contributions essentially pass through School Tuition Organizations does not transform these private entities into state actors. In *Rendell-Baker v. Kohn*, the Court considered a legal challenge to the employment practices of a private school that received "virtually all of [its] income . . . from government funding." 457 U.S. at 840. Public school districts were contracting with the private school to purchase special education services just as Scholarship Program parents here purchase educational services from private schools. The Court's conclusion in *Rendell-Baker* that the government contracts "[did] not make the . . . [private school's] decisions acts of the State," *id.*, applies here.

It is also important to identify exactly who the Scholarship Program is designed to aid. The Scholarship Program aids school children and their families. It does not aid School Tuition Organizations. Indeed, those organizations are not able to keep the vast majority of the contributed funds. They can keep only a small amount to cover their administrative costs. The Scholarship Program also does not aid taxpayers because their contribution merely reduces their tax liability by the amount contributed, meaning they realize no net financial gain from their contribution.

It is parents and children who receive the money in the form of scholarships. Families, therefore, are the beneficiaries of the Scholarship Program. Families use the scholarships to purchase educational services from private schools and their decisions to do so are not "acts of the state."

The funding for the challenged program flows from the decisions of individual taxpayers, who write checks drawn from their personal bank accounts, to School Tuition Organizations and then to parents—who independently decide where to enroll their children and which School Tuition Organizations to apply to for scholarship funds. Not a single dollar is transferred from the state to any School Tuition Organization. "The availability of scholarships to particular students and particular schools thus depends [not on government decision makers, but] on the amount of funding a [School Tuition Organization] receives [from taxpayer contributions.]" *Winn*, 562 F.3d at 1006. Receipt by School Tuition Organizations of funds from private citizens intended to benefit other private citizens cannot form the basis of a finding that School Tuition Organizations are state actors.

4. Compliance With State Regulations Does Not Transform School Tuition Organizations Into State Actors.

Respondent Taxpayers argue that the recent legislative amendments to the Scholarship Program

alter the very nature of School Tuition Organizations. But, as explained more fully in all of the Replies to the Respondent Taxpayers' Supplemental Brief Regarding a Change in State Law, nothing about the revised structure of the Scholarship Program alters the fact that "individuals voluntarily . . . contribute money" to School Tuition Organizations and that "the state's involvement stops with . . . making tax credits available." *Winn*, 586 F.3d at 659-60 (O'Scannlain, J., dissenting). Each School Tuition Organization's decision to support either religious or secular schools—or both—is in no way influenced by the state. And while the legislative amendments add some modest regulatory oversight, the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." *Blum*, 475 U.S. at 1004 (quoting *Jackson*, 419 U.S. at 350).

5. Conclusion

In sum, there is no government involvement with religion whatsoever pursuant to the Scholarship Program. The government does not give money to any School Tuition Organization. No government actor decides which children receive scholarships from School Tuition Organizations. The relationship between the tax benefit to the taxpayer and the decision by parents to send their children to religious schools and apply for scholarships from religiously affiliated School Tuition Organizations is simply too attenuated and too variable over time to constitute government involvement with religion. Therefore, the Scholarship Program does not implicate the Establishment

Clause. *Mueller*, 463 U.S. at 400 ("The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.").

B. The State Does Not Skew Incentives Toward Religion.

The question at the center of this case is whether "the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987). As demonstrated in section I.A. above, the answer to that question is no. However, Respondent Taxpayers assert that the answer is yes because of the unrestricted freedom School Tuition Organizations enjoy to award scholarships—including the ability to award scholarships only to families who choose to enroll their children in religiously affiliated schools. Winn Br. 11-14. This argument is not only premised on the unfounded notion that School Tuition Organizations do not offer scholarships to nonreligious schools,[5] but

[5] According to a 2009 Department of Revenue report, the following secular School Tuition Organizations, among others, had ample resources to grant scholarships to nonreligious private schools: Arizona Scholarship Fund ($5,159,220); Institute for a Better Education ($4,803,063); Tuition Organization for Private Schools ($1,474,937); Arizona Private Education

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also improperly focuses solely on the Scholarship Program rather than the full array of educational choices Arizona provides to parents.

The question is whether Arizona "is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options" Arizona "provides [its] schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." *Zelman*, 536 U.S. at 656. By examining the Scholarship Program in light of the vast array of nonreligious educational options Arizona provides to families, it is abundantly clear that the state is not skewing incentives toward religion.

Respondent Taxpayers ignore the full range of educational choices available to Arizona parents. Instead, they focus on an alleged dearth of available scholarships to attend nonreligious private schools. Putting aside the fact that *many* School Tuition Organizations provide scholarships to nonreligious schools, Arizona offers families one of the broadest arrays of educational choices in the nation. Dennard Br. 39-43. These options include, among others, a

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Scholarship Fund ($1,466,020); and the Arizona School Choice Trust ($1,022,823) (one of the Intervenors and Respondents in Support of Petitioners in this case). Ariz. Dept. of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009* (Apr. 21, 2010), *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2009.pdf.

robust charter school law and open public school enrollment that prohibits school districts from charging parents tuition. A.R.S. § 15-181, *et seq.*; A.R.S. § 15-816.01. In *Zelman*, the Court looked to precisely these types of additional public options in concluding that there was "no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children." *Zelman*, 536 U.S. at 655 (noting that students could "remain in public school as before . . . obtain a scholarship . . . enroll in a community school, or enroll in a magnet school"). And while such a wide array of options "are not necessary" to the constitutionality of indirect programs based on private choice, they do "clearly dispel the claim that the program 'creates . . . financial incentives for parents to choose a sectarian school.'" *Zelman*, 536 U.S. at 654 (quoting *Zobrest*, 509 U.S. at 10).

In seeking to distinguish *Zelman*'s holding, Respondent Taxpayers misconstrue and misrepresent the program upheld in that case. The Cleveland program did not require nonreligious private schools to participate. *Zelman*, 536 U.S. at 645. It was thus entirely plausible that the program in *Zelman* could have resulted in parents not being able to choose nonreligious schools. The program permitted—but did not require—area public schools to participate and, indeed, none chose to do so. *Id.* at 645-47. Of the private schools that chose to participate, 82 percent were religious, with approximately 96 percent of voucher recipients attending religious schools.

Id. And yet, the Court said that merely because "46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause." *Id.* at 655. Thus, even where no public schools participated and the overwhelming majority of private schools participating in the program were religious, the Court held there were "no 'financial incentives' that 'skew' the program toward religious schools." *Id.* at 653 (quoting *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487-88 (1986)).

The Scholarship Program leaves the decision to contribute to School Tuition Organizations in the hands of taxpayers. It leaves the decision for which schools to award scholarships in the hands of School Tuition Organizations. And it leaves the decision of which private schools to enroll their children in and which School Tuition Organizations to apply to for scholarship funds in the hands of parents. And those parents had a plethora of public schools, including numerous charter schools, to choose from. A program so thoroughly controlled by private choice does not violate the Establishment Clause.

C. The Establishment Clause Does Not Prohibit Individuals From Using Indirect Educational Aid To Obtain A Religious Education.

Respondent Taxpayers assert that before *Zelman*, individuals were not permitted "to use tax-raised funds" at "religious schools to support the *religious*

instructional activities of those schools." Winn Br. 48. That assertion is wrong. In every one of the Court's indirect educational aid cases, the government aid at issue was used to support religious instructional activities, and in each case the educational aid program was upheld. In *Zobrest*, 509 U.S. at 4 n. 1, it was stipulated that "secular education and advancement of religious values or beliefs [we]re inextricably intertwined" in the Catholic school in which petitioner Zobrest's parents enrolled him. And the Court made it clear that the government-funded sign language interpreter, to which petitioner Zobrest was entitled, would transmit the pervasively sectarian content taught in the high school. *Id.* at 13. In *Witters*, 474 U.S. at 482, government aid was given to "a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director." Naturally, pursuing a degree in vocational ministry involves religious instruction. And, of course, *Mueller*, 463 U.S. 388, involved a tax deduction for tuition at religious schools that imposed no requirement that students must be allowed to opt out of the school's religious instruction. Under the Court's "Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke v. Davey*, 540 U.S. 712, 719 (2004). It is thus constitutionally permissible to give families the choice to use educational aid to purchase a religious education.

Respondent Taxpayers base their argument on *Bowen v. Kendrick*, 487 U.S. 589 (1988), which involved government grants to religious institutions for counseling and education services pursuant to a federal program designed to educate adolescents about family life. While aspects of *Bowen* are instructive, particularly as it relates to whether the Scholarship Program is supported by a legitimate government interest, there are nevertheless significant limits to its applicability in this case because it involved a direct—rather than an indirect—aid program.

In *Bowen*, government officials selected which organizations received federal funds. Thus, the Court imposed some limits on exactly how those organizations could use the aid. Here, the government does not choose which School Tuition Organizations receive money or, in turn, to which families the School Tuition Organizations give scholarships. In two post-*Bowen* cases involving direct aid programs, the Court said "the question of whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to government action." *Agostini v. Felton*, 521 U.S. 203, 230 (1997) and *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion). Thus, even in direct aid cases private choice is still determinative. Because there are no decisions made by governmental actors under the Scholarship Program, it would be unreasonable to attribute any

parents' decision to enroll their child in a religious school and obtain a religious education to governmental coercion.

Regardless of the constitutional restrictions imposed on direct governmental aid programs, the Court has never struck down an indirect educational aid program characterized by true private choice merely because families use that aid to obtain a religious education. Respondent Taxpayers offer no compelling arguments for the Court to do so here.

II. ARIZONA'S SCHOLARSHIP PROGRAM SERVES LOW- AND MODERATE-INCOME FAMILIES.

Faced with a dearth of favorable case law, Respondent Taxpayers resort to a form of *ad hominem* argument by citing to a number of articles published by *The Arizona Republic* and *The East Valley Tribune*. Winn Br. 10, 43; Winn Opp'n Br. 9-11. These articles cast aspersions on the Scholarship Program as primarily awarding scholarships to wealthy families. But a recent survey by Dr. Vicki Murray of student-level data obtained directly from School Tuition Organizations demonstrates that the program does a good job of serving low- and moderate-income families. Vicki E. Murray, Ph.D., *An Analysis of Arizona Individual Income Tax-credit Scholarship Recipients' Family Income, 2009-10 School Year*, Program on Education Policy and Governance, Harvard University 10-18 (October 2010), *available at*

http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG10-18_Murray.pdf.

Dr. Murray's analysis assessed *The East Valley Tribune*'s and *The Arizona Republic*'s repeated claim that Arizona's Scholarship Program does not serve low-income families. *Id.* at 2. Those newspapers interviewed officials or cited related statistics from approximately 15 of the 55 School Tuition Organizations operating at the time. *Id.* Yet neither newspaper collected student-level income data to verify that allegation. *Id.* Dr. Murray collected family income and related data directly from School Tuition Organizations for 19,990 students during the 2009-10 school year, which represents nearly 80 percent of all scholarships awarded in 2009. *Id.* at 5-6. Her analysis also compared the family incomes of scholarship recipients to U.S. Census Bureau median family incomes using addresses and zip codes provided by School Tuition Organizations. *Id.* at 6. The results of her analysis show:

- Scholarship recipients' median family income was $55,458—nearly $5,000 lower than the U.S. Census Bureau statewide median annual income of $60,426. It was also nearly $5,000 lower than median incomes in recipients' neighborhoods, as estimated using student addresses and zip codes. *Id.* at 14.

- The annual family income of more than two-thirds (66.8 percent) of scholarship recipients would qualify them for another of Arizona's educational aid

programs, the corporate tax credit scholarship program, eligibility for which is capped at $75,467 for a family of four. *Id.* at 15.

- A higher proportion of scholarship recipients come from families whose incomes qualify them as poor (at or below $20,050 for a family of four) than the U.S. Census Bureau statewide average, 12.8 percent compared to 10.2 percent. *Id.*

Dr. Murray's analysis found no factual basis for the claims that Arizona's Scholarship Program limits access to privileged students from higher-income families. *Id.* at 16. Instead, an overwhelming majority of the individuals receiving scholarships under the Scholarship Program also qualify for Arizona's separate, means-tested and corporately-funded scholarship program. *Id.*

Arizona's Scholarship Program is not just a program of private choice, it is a vital educational aid program that is helping tens of thousands of low- and middle-income families pursue opportunities that would otherwise be foreclosed to them. Nothing in the Constitution imposes a one-size-fits-all approach to public education, nor does it categorically prohibit states from creating programs that emphasize parental choice over centralized control and that include, among various educational options, private religious schools.

CONCLUSION

Respondents' Complaint was properly dismissed because it challenges a program of true private choice that is fully consistent with the Court's Establishment Clause precedent. The Respondents in Support of Petitioners, Glenn Dennard, Luis Moscoso, and the Arizona School Choice Trust, request the Court to reverse the judgment of the Ninth Circuit and remand the case with instructions to enter judgment in favor of Defendants and Defendant-Intervenors.

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October 15, 2010

SUPPLEMENTAL BRIEF

Nos. 09-987, 09-991

Supreme Court, U.S.
FILED
AUG 17 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING A CHANGE IN STATE LAW

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RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING A CHANGE IN STATE LAW

STATEMENT

This case involves an Establishment Clause challenge to the constitutionality of an Arizona statutory tuition-voucher program that was originally enacted by the Arizona Legislature in 1997. The district court dismissed respondents' (plaintiffs') complaint for failure to state a claim upon which relief could be granted. The court of appeals reversed the dismissal of the complaint and remanded the case to the district court in order to give respondents an opportunity to prove their allegations. Petitions for rehearing en banc were denied. Certiorari petitions were filed, and this Court granted review on May 24, 2010. No temporary or preliminary injunctive or other relief has been granted.

Respondents file this supplemental brief to bring to the Court's attention the fact that, after the decision below, extensive changes were made in the state legislation that is the subject of this case. The changes were made after the denial of rehearing in the court below, and after the filing of the petitions for certiorari and respondents' brief in opposition, but shortly before petitioners filed reply briefs at the petition stage. Those briefs made no mention of the new legislation, nor did the parties bring the new legislation to the Court's attention in the three weeks that elapsed between the filing of those briefs and the grant of certiorari. The Court thus granted certiorari

without knowledge that the governing state law had been substantially changed.

The legislative changes are contained in two separate bills, S.B. 1274 and H.B. 2664. They are reproduced at App. 1 – App. 17 of petitioner Garriott's brief on the merits. The bills were enacted on April 20 and 27, 2010, and signed into law by the Governor on April 27 and May 10. S.B. 1274 amends Arizona's existing tax-credit statute, codified as A.R.S. § 43-1089. S.B. 1274 became effective on July 27, 2010. H.B. 2664 adds a new chapter to Title 43 of the Arizona Revised Statutes, which deals with taxation. The new chapter imposes extensive new regulations on Arizona's school tuition organizations (STOs) – the organizations that award scholarships in the Arizona program. The new regulatory system will be enforced and administered by the Arizona Department of Revenue. H.B. 2664 will become effective on January 1, 2011. Respondents first learned of this new legislation when they received petitioners' briefs on the merits.

The new legislation is mentioned, but summarily dismissed as irrelevant, in footnotes in petitioners' merits briefs. See Pet. Garriott Br., p. 4, n. 2; Pet. Arizona Christian School Tuition Organization Br., p. 5, n. 4. See also Resp. Arizona School Choice Trust Supporting Petitioners Br., p. 3, n. 2. The new legislation, however, is not irrelevant. Petitioners have maintained, throughout this litigation, that Arizona's tax-credit program is a program of private charity that need not comply with the Establishment Clause.

Arizona's new legislation demonstrates conclusively that the program is not a program of private charity, but rather a governmental spending program that uses STOs as the state's surrogates to distribute government tax revenues for the government's educational purposes. The parties will no doubt disagree about the extent of the effect of the new legislation on the issues before the Court. The Court, however, should have been informed of the passage of the new legislation prior to granting the petitions for certiorari. This supplemental brief is filed to notify the Court of the change in Arizona legislation as promptly as possible after respondents became aware of it.

DISCUSSION

The new legislation responds to recommendations for comprehensive reform of the Arizona tax-credit program that were made to the Arizona Legislature by a legislative task force during the Legislature's 2010 session. The task force was formed in response to strong public concerns over misuse and corruption in the tax-credit program, which were revealed in lengthy investigative reports published by two major Phoenix newspapers during 2009. See Respondents' Brief in Opposition, pp. 9-12. The Department of Revenue's lack of sufficient resources and legal authority adequately to control the tax-credit program was emphasized in these articles.

The new legislation includes the following major provisions:

- **Requirement for STO Certification.** STOs will hereafter be required to apply for, and obtain, certification from the Department of Revenue in order to participate in the tax-credit program. To be certified, they must establish that their *sole* purpose is "to receive contributions from taxpayers for the purposes of income tax credits under section 43-1089," and that they "meet . . . the requirements imposed by this [new] chapter." The Department of Revenue is required to "[m]aintain a public registry of currently certified school tuition organizations," keep the registry up to date, and post the registry of certified STOs on its official web site. A.R.S. § 43-1602(A), (B), App. 9-App. 10. (All App. Cites are to the Appendix to Petitioner Garriott's Brief on the Merits.

- **When "Contributions" May Be Made to STOs.** The new legislation provides, for the first time, that taxpayers may make a "contribution" to an STO, and receive a 100%, dollar-for-dollar credit for that "contribution," when they file their tax return for the year for which they claim the credit. Taxpayers therefore no longer need to spend even a single penny of their own money to "contribute" to an STO. They simply pay their tax bill by paying part of their taxes due to the STO, and part to the Department of Revenue, at the same time. The taxpayer pays the same amount in taxes whether or

not the taxpayer "contributes" to an STO. The money "contributed" is not the taxpayer's money or the STO's money. It is the state's money. A.R.S. § 43-1089(C), App. 5.

- **Increase in the Dollar Amount of the Credit.** The amount taxpayers may take as a credit is newly linked to the consumer price index. The amount, however, may now never be reduced. A.R.S. § 43-1089(C), App. 5.

- **Regulation of STO Finances.** State law will now not only require STOs to award at least 90% of the tax revenues they receive as state-funded scholarships (the remainder of the tax revenues they receive are used to pay STO salaries and administrative costs, so that STO operations are funded entirely by the state), but will prohibit them from accumulating revenues in order to invest or reserve funds for future awards. To permit the Department of Revenue to monitor compliance with this new requirement, STOs will be required annually to report the number and amount of "contributions" they receive each year, and the number and amount of scholarships they award each year from those revenues. STOs must also report the number and amount of scholarships awarded according to the schools the students attend. In addition, STOs will be required annually to report the "names, job titles and annual salaries of the three [STO] employees who receive the highest annual salaries." A.R.S.

§ 43-1603(B)(1), App. 12; A.R.S. § 43-1604, App. 13-15.

• **Scholarship Award Standards.** Before the new legislation, STOs were free to use any standards they wished in selecting scholarship recipients. In the future, they will be required "to consider the financial need of applicants." They must annually report to the Department of Revenue (1) the "total dollar amount of educational scholarships and tuition grants awarded during the previous fiscal year to [s]tudents whose family income meets the economic eligibility requirements established under the [federal] national school lunch and child nutrition acts," and (2) the amount awarded to students whose family income falls between that amount and one hundred eighty-five percent of the federal school lunch amount. A.R.S. § 43-1603(D)(2), App. 13; A.R.S. § 43-1604(A)(7)(8), App. 14-15.

STOs will also be newly forbidden to "award, designate or reserve scholarships solely on the basis of donor recommendations"; nor may they permit taxpayers to "designate student beneficiaries as a condition of any contribution," or "facilitate, encourage or knowingly permit the exchange of beneficiary student designations." These had all been common STO practices prior to the legislative revision. A prescribed official "NOTICE" of the new restrictions must be included by the STO in any "printed materials soliciting donations, in applications for

scholarships and on [the STO's] website." A.R.S. § 43-1603(B)(3)(4), App. 12; A.R.S. § 43-1603(C), App. 12-13.

• **State Supervision and Enforcement.** These new rules are mandatory, not advisory. Compliance is to be closely monitored by the Department of Revenue, which "shall send written notice by certified mail to a school tuition organization if the department determines that the [STO] has engaged in" any prohibited activity or practice. An STO will have "ninety days to correct the violation." If the STO fails to comply within that period, the Department has power to withdraw the STO's certification and to require the STO to "offer to refund all donations received after the date of the notice of termination of certification." An STO may request an administrative hearing to review the Department's termination of its certification. If the termination of certification is sustained, that decision is subject to judicial review. A.R.S. § 43-1602(D), App. 11.

• **Audits of STO Operations.** Each STO must newly subject itself each year, at its expense, to an audit or financial review (depending upon the amount of contributions received by the STO that year). The audit or review is to be conducted by an independent licensed certified public accountant, who is required to "evaluate the organization's compliance with the fiscal requirements of this article." STOs must file signed copies of the annual audits filed with the Department of

Revenue within five days of their receipt. A.R.S. § 43-1605, App. 15-17.

The questions before the Court in this case are whether respondents' complaint states a cause of action under the Establishment Clause, and whether respondent taxpayers have standing to make that claim. Despite petitioners' and *amici's* suggestions to the contrary, respondents' claim is not based on the contention that state voucher plans are not constitutionally permitted to pay for religious-school tuition, or that a state voucher plan is unconstitutional because a large majority of parents receiving the vouchers decide to use them at religious schools. Respondents' claim is based on their allegations that, in Arizona, most state scholarships are *awarded* to parents on the basis of religion, and that these scholarships *require* parents to send their children to religious schools. The court of appeals has held that these allegations state an Establishment Clause claim, and that taxpayers who are taxed to fund the scholarship program have standing to assert that claim.

No one, we believe, would contend that a state Department of Education, authorized by state law to award scholarships from state funds to students attending non-public schools, could constitutionally make scholarship awards that are based on the religion of student applicants, or make scholarship awards that require parents to send their children to a religious school in order to receive a scholarship. The core of respondents' case is that those

prohibitions apply to Arizona's STOs, as they would apply to the state, because those STOs do exactly what a state agency would do as part of an ordinary state-voucher plan – they award state funds, for a state purpose, pursuant to rules and procedures prescribed by the state.

The court of appeals has held that respondents' complaint states a claim that the Constitution's prohibitions on religiously based state scholarships apply to Arizona's STOs. The court based that holding on the relationship that exists between Arizona and its STOs, including the following: all of the funds that STOs award as scholarships are tax revenues (rather than private charitable contributions); the STOs award these wholly state-funded scholarships on the state's behalf, pursuant to a state statute, to serve the state's educational (rather than private charitable) purposes; STOs are the only organizations that perform this scholarship-granting function for the state; and this the only function that the STOs perform – they engage in no other charitable or non-charitable activity.

Petitioners, their *amici*, and the court of appeals judges who dissented from the denial of rehearing en banc below, disagree with the court of appeals' characterization of the relationship between Arizona and its STOs. They argue that STOs are private charitable organizations that are completely immune from Establishment Clause scrutiny. Arizona's new legislation obviously bears directly upon this core issue. By requiring STOs to be certified by the state in order

to award scholarships on the state's behalf, by giving the Department of Revenue authority to withdraw that certification, by requiring STOs to be established solely for the purpose of participating in the state's scholarship program, by subjecting STOs to extensive new state regulations of their finances and their reasons for awarding scholarships, and by clarifying that every penny of scholarship money that STOs award is tax revenue, not private charity, the new legislation strongly confirms the conclusion that the relationship between Arizona and its STOs may warrant Establishment Clause scrutiny of STO religious discrimination. Respondents will so argue in their brief on the merits, which will, of course, address the relationship between the state and its STOs under Arizona's new tax-credit system, rather than the less entangled relationship considered by the district court and the court of appeals.

Neither the court of appeals nor the district court has had an opportunity to assess the impact on this case of the changes that Arizona has made in its law, nor have respondents had the opportunity to amend their complaint to take account of those changes. Had the court been informed of these changes before acting on the petitions for certiorari, that information might have been relevant to the Court's decision whether initially to assess the impact of the changes itself, without the benefit of the consideration of that issue by the courts below, or whether to permit the case to be remanded to the district court, as the court

of appeals held, for proceedings that would address Arizona's current program.

CONCLUSION

The Court was not informed of significant changes in Arizona law that occurred prior to the decision to grant the petitions for certiorari. It may wish to consider remanding the case, which has never proceeded beyond the interlocutory stage, for further proceedings that would take account of the extensive statutory changes that have be made subsequent to the decision below.

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AMICUS CURIAE BRIEF

Nos. 09-987 and 09-991

In the Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, PETITIONER

v.

KATHLEEN M. WINN, ET AL.

GALE GARRIOTT, DIRECTOR, ARIZONA DEPARTMENT OF REVENUE, PETITIONER

v.

KATHLEEN M. WINN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondents have standing as taxpayers to assert an Establishment Clause challenge to an Arizona statute that provides tax credits for voluntary contributions to organizations that award scholarships to children attending private schools, including religious schools.

2. Whether the Arizona statute has the purpose or effect of advancing religion in violation of the Establishment Clause.

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In the Supreme Court of the United States

No. 09 987

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, PETITIONER

v.

KATHLEEN M. WINN, ET AL.

No. 09 991

GALE GARRIOTT, DIRECTOR, ARIZONA DEPARTMENT OF REVENUE, PETITIONER

v.

KATHLEEN M. WINN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case involves an Establishment Clause challenge by Arizona taxpayers to a state statute that provides tax credits for taxpayers who donate money to private organizations that provide scholarships to students attending private schools. The Court has granted

petitions for writs of certiorari addressing respondents' standing and the merits of their claim. The United States has an interest in both questions.

The United States and federal officials are frequently defendants in Establishment Clause cases in which plaintiffs claim standing solely as federal taxpayers. See, *e.g.*, *Hein* v. *Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Flast* v. *Cohen*, 392 U.S. 83 (1968). The United States has an interest in the proper resolution of the question whether respondents have standing as state taxpayers because federal and state taxpayer standing are analyzed similarly under this Court's precedents. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 345 (2006).

The United States also has an interest in the merits of this case since several federal statutes authorize federal income tax credits, deductions, and exemptions that provide indirect benefits to a wide range of private schools, including religious schools. See, *e.g.*, 26 U.S.C. 25A (Hope and Lifetime Learning credits); 26 U.S.C. 530(a) and (b)(3)(A)(ii) (exempting from income tax Coverdell education savings accounts used to pay tuition for "elementary or secondary school student at a public, private, or religious school"); 26 U.S.C. 222(a) (tax deduction for qualified tuition and related expenses). The United States has appeared in this Court as amicus curiae in several cases such as this one that involved Establishment Clause challenges to neutral programs of true private choice. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters* v. *Washington Dep't of*

Servs. for the Blind, 474 U.S. 481 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983).

STATEMENT

1. For the last 13 years, the Arizona Tuition Tax Credit Act has permitted Arizonans to support organizations that provide scholarships to children attending private schools. See 1997 Ariz. Sess. Laws, page no. 549 (Ariz. Rev. Stat. Ann. § 43-1089 (Supp. 2009) (Section 1089)), *reproduced at* Pet. App. 117a.[1] Section 1089 allows any individual who owes at least $500 in Arizona income taxes a credit against state tax liability by the amount, not to exceed $500, that he or she contributes to a school tuition organization (STO). See Section 1089(A)(1); see also Section 1089(C) (credit not refundable). Married couples receive a credit of up to $1000 for contributions to an STO. See Section 1089(A)(3). Any person can make a donation to an STO and receive a state tax credit, regardless of whether the taxpayer has children in school or has incurred any educational expenses. See Section 1089(A). A tax credit is not allowed "if the taxpayer designates the taxpayer's contribution to the [STO] for the direct benefit of any dependent of the taxpayer." Section 1089(E).[2]

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[1] Citations to the Pet. App. refer to the Appendix filed in No. 09-991.

[2] In a recent amendment, Arizona also specified that a tax credit is not allowed under Section 1089 if (1) the taxpayer designates *any* "student beneficiary as a condition of the taxpayer's contribution to the [STO]," or (2) "if the taxpayer, with the intent to benefit the taxpayer's dependent, agrees with one or more other taxpayers to designate each taxpayer's contribution to the [STO] for the direct benefit of the other taxpayer's dependent." 2010 Ariz. Legis. Serv. ch. 293 § F (West); see Garriott Br. 10-11 (summarizing other changes to statute made in 2010). All citations in this brief are to the previous version of the statute.

An STO must be a charitable organization that is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code and must "allocate[] at least ninety per cent of its annual revenue for educational scholarships or tuition grants" for children attending "qualified school[s]." Section 1089(G)(3); see Section 1089(G)(2) (defining "qualified school" as one that, *inter alia*, "does not discriminate on the basis of race, color, handicap, familial status or national origin"). An STO may not limit its scholarships to students attending only one school, see Section 1089(G)(3), but is otherwise free to decide at which schools its scholarships may be used.

2. Shortly after Section 1089's enactment, the Supreme Court of Arizona rejected an Establishment Clause challenge to the statute. See *Kotterman* v. *Killian*, 972 P.2d 606, cert. denied, 528 U.S. 810, and 528 U.S. 921 (1999). The court held that Section 1089 had the secular purpose of "bring[ing] private institutions into the mix of educational alternatives open to the people of [Arizona]." *Id.* at 611. The court also held that the statute does not have the primary effect of advancing religion because the tax credit it authorizes is "available to all taxpayers who are willing to contribute to an STO" without regard to religion and because "multiple layers of private choice" preclude attributing to the State any benefit religious schools may derive from the statute. *Id.* at 613, 614; see *id.* at 616-625 (rejecting challenges brought under Arizona constitution).

3. Respondents subsequently filed this suit in federal court, alleging that Section 1089 violates the Establishment Clause because Arizona interprets the statute to allow STOs to provide scholarships to students attending only religious schools. The district court dismissed the complaint for lack of federal subject matter

jurisdiction pursuant to the Tax Injunction Act, 28 U.S.C. 1341, but the Ninth Circuit reversed and remanded, and this Court affirmed. See *Hibbs* v. *Winn*, 542 U.S. 88 (2004).

On remand, the district court dismissed the complaint, holding that Section 1089 is a neutral program of private choice of the kind this Court found consistent with the Establishment Clause in *Zelman*, 536 U.S. 639. See Pet. App. 47a-63a.

The court of appeals reversed. The court first held that respondents have taxpayer standing because they allege that Arizona is using its taxing and spending power to advance religion in violation of the Establishment Clause. Pet. App. 9a. On the merits, the court held that if respondents are able to prove that Arizona permits STOs to grant scholarships only to students attending religious schools, respondents may be able to show that the statute's ostensible purpose—to expand the access of Arizona students to a wide range of schooling options—is a "pretense." *Id.* at 20a. The court of appeals also held that, accepting respondents' allegations as true, Section 1089 unlawfully "delegat[es] to taxpayers a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.'" *Id.* at 22a (brackets in original) (citation omitted). Because respondents alleged that several of the largest STOs limited scholarships to only attendees of certain religious schools, the court of appeals held that the statute impermissibly "requir[ed] parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education." *Id.* at 23a.

The court of appeals denied rehearing, with eight judges in dissent. See Pet. App. 87a-116a.

SUMMARY OF ARGUMENT

The court of appeals made two errors. First, it found that respondents had standing, even though they have suffered no legally cognizable injury. Arizona's decision to voluntarily forego some particular tax collections from individuals who make private and voluntary donations to STOs does not harm respondents. Second, the court of appeals incorrectly analyzed Section 1089 on the merits. Properly understood, the statute is a neutral program of private choice and thus does not have the purpose or effect of advancing religion in violation of the Establishment Clause.

A. Article III requires plaintiffs in federal court to show they have standing by establishing that they suffered a concrete injury that is fairly traceable to the defendant's allegedly illegal conduct and that would be redressed by the requested relief. Generalized grievances, such as those expressed by a taxpayer who objects to use of her tax money for a government program she alleges is unlawful, do not typically satisfy this requirement. See *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). In such a case, the claimed injury is infinitesimally small and conjectural, and affording standing to the plaintiff puts the federal courts in the inappropriate role of superintending state and federal fiscal administration. See *Cuno*, 547 U.S. at 341.

In *Flast*, 392 U.S. 83, the Court established a narrow exception to the prohibition on taxpayer standing. In that case, the Court found that plaintiffs had standing to assert an Establishment Clause challenge to legislatively mandated grants to religious organizations. In

subsequent cases, the Court has limited the *Flast* exception to those facts, and has not allowed taxpayer standing for other constitutional claims or for other kinds of expenditures. See *Hein*, 551 U.S. at 602 (opinion of Alito, J.).

The program challenged by respondents in this case is materially different from the one involved in *Flast*, and their status as Arizona taxpayers is thus insufficient to confer standing. The Court has never found that some taxpayers have standing to challenge a tax credit provided to other taxpayers. And it certainly has not done so in the context of a statute like Section 1089, where every dollar that flows to religious organizations does so as the result of private choices rather than a government mandate. A finding of standing in this case would thus impermissibly extend the *Flast* exception to the prohibition on taxpayer standing. *Hein*, 551 U.S. at 610, 615 (opinion of Alito, J.).

B. Section 1089 is consistent with the Establishment Clause because it has neither the purpose nor the effect of advancing religion. The Court has consistently and repeatedly rejected Establishment Clause challenges to neutral programs of private choice such as this one.

Section 1089 has an obvious secular purpose: increasing educational options for Arizona's school children. There is no indication in the statute's text or legislative history of a purpose to advance religion. This case is thus distinctly unlike the instances in which the Court has found that statutes—such as ones requiring display of the Ten Commandments—had impermissible religious purposes. The fact that Section 1089 permits STOs to limit their scholarships to only a subset of Arizona's private schools provides no evidence of a religious

purpose. That flexibility is available to all STOs, not just religious ones.

Nor does Section 1089 have the primary effect of advancing religion. This Court has on several occasions found that programs of private choice pass this test. See, *e.g.*, *Zelman*, 536 U.S. at 648-649. Such programs provide a governmental benefit on a neutral basis without regard to religion and permit recipients to direct that benefit to their choice of institutions—secular and religious. Money that flows to religious institutions in such cases does so as the result of private decisionmaking, not state direction, and thus does not amount to the establishment of religion by the government. Section 1089 fits squarely within that paradigm. Any Arizona taxpayer (with sufficient tax liability) may claim a credit, and may do so for contributions to any STO, whether secular or religious. Because Section 1089 merely enables taxpayers to engage in unconstrained and wholly voluntary private decisions to write checks to STOs of their choice, "the circuit between government and religion [i]s broken," and the Establishment Clause analysis ends. *Id.* at 652.

The court of appeals further erred by shifting the focus beyond the choices exercised by Arizona taxpayers to those available to Arizona parents applying to STOs for scholarships. It is true that those parents' choices are constrained by the availability of scholarship money and by the policies of STOs. Those constraints, however, are not attributable to Arizona but are the result of individual private decisions. They thus do not concern the Establishment Clause. *Zelman*, 536 U.S. at 656.

ARGUMENT

I. RESPONDENTS LACK STANDING TO ASSERT THEIR CLAIM

Plaintiffs generally lack Article III standing to challenge government programs to which they object based solely on their status as taxpayers. This Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968), established a narrow exception to this general prohibition for Establishment Clause claims involving legislatively-mandated government grants to religious institutions, but the theory of standing in that case has not been extended beyond such challenges. *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 609-610, 615 (2007) (opinion of Alito, J.).[3] The challenge here—to a tax credit, not a government grant, and to expenditures made as the result of private choices, not legislative requirement—is very different from the one at issue in *Flast*. Respondents' status as taxpayers is thus insufficient to provide them with standing.

A. Article III's Case-Or-Controversy Requirement Generally Prohibits Taxpayer Standing

Article III of the Constitution limits the judicial power to resolution of actual "Cases" and "Controversies." U.S. Const. Art. III, § 2. "[N]o principle is more fundamental to the judiciary's proper role in our system

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[3] A three-Justice plurality in *Hein* found no standing because the *Hein* plaintiffs' claim was materially different from the one the plaintiffs in *Flast* had standing to assert. See 551 U.S. at 615. Justices Scalia and Thomas concurred in the judgment on the ground that *Flast* should be overruled (thus foreclosing all taxpayer standing). See *id.* at 618. The plurality's opinion controls because it rests on narrower grounds. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977). All subsequent citations to *Hein* in this brief are to the plurality opinion.

of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (internal quotation marks and citations omitted). To establish standing to proceed in federal court, a plaintiff must establish "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

Plaintiffs typically do not have a "sufficient personal stake" in a case for purposes of Article III when they "challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens." *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 613 (1989) (opinion of Kennedy, J.). Accordingly, in *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), the Court held that a plaintiff's status as a federal taxpayer did not establish her standing to challenge the constitutionality of a federal spending program. *Id.* at 486-487. As the Court explained, a taxpayer's

> interest in the moneys of the Treasury * * * is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Id. at 487; see *Cuno*, 547 U.S. at 344 (taxpayer's "injury" from allegedly unlawful expenditure is "not 'concrete and particularized,'" nor is it "actual or imminent") (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Permitting standing based on nothing more than a plaintiff's status as a taxpayer would put no limit on those able to invoke the federal courts' jurisdiction to air generalized grievances. See *Frothingham*, 262 U.S. at 487. And in a case (like this one) in which plaintiffs challenge a state statute as unconstitutional, "affording state taxpayers standing * * * simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *Cuno*, 547 U.S. at 346 (internal quotation marks and citation omitted).

B. The Exception To The Rule Against Taxpayer Standing Recognized In *Flast* Has Been Limited To A Narrow Category Of Establishment Clause Challenges

Flast "carved out a narrow exception to the general constitutional prohibition against taxpayer standing." *Hein*, 551 U.S. at 602. In *Flast*, plaintiffs challenged expenditures that "were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate." *Id.* at 604. *Flast* held that the plaintiffs had standing to challenge those expenditures because they satisfied two requirements.

First, the plaintiffs "establish[ed] a logical link between [their] status [as taxpayers] and the type of legislative enactment attacked." *Flast*, 392 U.S. at 102. The "logical link" was established in *Flast* because "the alleged Establishment Clause violation * * * was funded by a specific congressional appropriation and was undertaken pursuant to an express congressional

mandate." *Hein*, 551 U.S. at 604. Second, the Court in *Flast* held that the plaintiffs had "establish[ed] a nexus" between their "status" as taxpayers and "the precise nature of the constitutional infringement alleged" because they alleged that the "challenged enactment exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." 392 U.S. at 102-103.

The Court has subsequently made clear that *Flast* only "slightly lowered" the "impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers." *United States* v. *Richardson*, 418 U.S. 166, 173 (1974) (quoting *Flast*, 392 U.S. at 85); see *Cuno*, 547 U.S. at 348 (*Flast* has a "narrow application in our precedent"). The Court has narrowly interpreted *Flast*'s first requirement—that plaintiffs establish a "logical link between [their] status [as taxpayers] and the type of legislative enactment attacked," 392 U.S. at 102. Accordingly, the Court has rejected standing to raise Establishment Clause challenges that do not go to Congress's taxing and spending power, see *Hein*, 551 U.S. at 610, and it made clear in *Hein* that even exercises of the taxing and spending power will not be subject to taxpayer challenge unless certain prerequisites are satisfied.

In *Hein*, the Court concluded that the plaintiffs lacked taxpayer standing to challenge Executive Branch expenditures—made pursuant to general Congressional appropriations—on conferences they alleged violated the Establishment Clause. 551 U.S. at 595. *Flast* did not support taxpayer standing to bring such a claim, the plurality explained, because the expenditures at issue in

Hein "were not made pursuant to any Act of Congress" whose text expressly contemplated religiously-oriented expenditures. *Id.* at 605. "Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain[ed]"; the expenditures "resulted from executive discretion, not congressional action." *Ibid.* (footnote omitted).

After *Hein*, therefore, taxpayer standing to assert Establishment Clause claims is available only where a plaintiff is challenging a statute that expressly mandates or contemplates that a government grant will be disbursed to religious organizations or for religious uses. 551 U.S. at 605, 609. The Court has said that it has refused to "extend" *Flast* to provide standing for other types of challenges. *Id.* at 610.

C. Respondents Lack Taxpayer Standing To Challenge A Neutral Statute That Provides Tax Credits For Contributions Made Independently By Private Citizens

The theory of taxpayer standing upheld by the court of appeals in this case exceeds the "outer boundary" of the *Flast* exception. *Hein*, 551 U.S. at 610 (quoting *Richardson*, 418 U.S. at 196 (Powell, J., concurring)). *Flast* involved an Establishment Clause challenge to a federal grant program that benefitted religious schools. See 392 U.S. at 86-87. "The expenditures challenged in *Flast* * * * were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate." *Hein*, 551 U.S. at 604. Unlike the statute in *Flast* (and unlike the Virginia statute to which James Madison objected in

his famous Memorial and Remonstrance Against Religious Assessments, *Flast*, 392 U.S. at 103), the Arizona statute at issue here does not make grants or disburse government funds, and it does not direct the transfer of government money to religious institutions. Rather, the statute merely provides a beneficial tax consequence for private citizens who donate their own funds to STOs of their own choosing. The money involved never enters the State's treasury, and the portion of it that goes to religious institutions does so only due to the unfettered discretionary choices of private individuals.

These two key features—a credit against taxes owed by a private person rather than a grant out of the public treasury and independent private decisions to contribute to religious organizations rather than legislative mandate to pay money—distinguish this statute from the one at issue in *Flast*. Respondents' asserted injury is more speculative and attenuated than that found adequate in *Flast* and thus provides no basis for standing.

1. The general rule against taxpayer standing applies not only to challenges to traditional spending programs but also to "challenges to so-called 'tax expenditures,' which reduce amounts available to the treasury by granting tax credits or exemptions." *Cuno*, 547 U.S. at 343-344. The Court has never held, however, that the narrow *Flast* exception to the rule against taxpayer standing likewise applies to challenges to tax expenditures.

To the contrary, the Court has repeatedly emphasized that *Flast* applies only where the plaintiff alleges that his tax money is being "extracted and spent" by the government in violation of the Establishment Clause. 392 U.S. at 106; see *Hein*, 551 U.S. at 623 (quoting *Flast*); *Valley Forge Christian Coll.* v. *Americans*

United for Separation of Church & State, Inc., 454 U.S. 464, 507 (1982). A tax credit, by definition, does not extract one cent from taxpayers. To the contrary, it *forgoes* the extraction of state income taxes. As the Arizona Supreme Court explained in analyzing the statute at issue here,

> no money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

Kotterman v. *Killian*, 972 P.2d 606, 618, cert. denied, 528 U.S. 810, and 528 U.S. 921 (1999).

While the Court has made economic analogies in other contexts between tax credits and exemptions on the one hand and expenditures on the other, see, *e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 544 (1983), it has distinguished them in Establishment Clause cases, see *id.* at 544 n.10. In that context, the Court has held that "[t]here is no genuine nexus between tax exemption and establishment of religion" because the government's decision to passively forego tax revenue does not implicate the historical concerns with government cash subsidies that animated the Establishment Clause. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970); see *id.* at 690 (Brennan, J., concurring) ("Tax exemptions and general subsidies * * * are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other

hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.") (footnotes omitted); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 882 n.7 (1995) (Souter, J., dissenting) ("[T]he Court in *Walz* explicitly distinguished tax exemptions from direct money subsidies and rested its decision on that distinction.") (internal citation omitted).[4]

In addition, the "harm" to the treasury allegedly caused by certain tax credits is conjectural in a way that is not necessarily true of government spending. The Court in *Cuno* explained that it was "unclear that tax breaks of the sort at issue [in that case] do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues." 547 U.S. at 344. The Court has made a similar observation with respect to tax benefits that encourage private school attendance: "By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers." *Mueller* v. *Allen*, 463 U.S. 388, 395 (1983).

2. The integral feature of private choice in Section 1089 provides a second critical difference with the statute at issue in *Flast*. In *Hein*, the Court distinguished *Flast* because expenditures to which the *Hein* plaintiffs objected were made pursuant to a general appropriation

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[4] In *Walz* the Court's distinction between tax exemptions and subsidies was part of its analysis of the merits of the Establishment Clause claim in that case. The Court did not consider the plaintiffs' standing. See *infra* n.5 (discussing court of appeals' suggestion that *sub silentio* exercises of jurisdiction in previous cases supported finding of standing here).

for the Executive Branch that "did not expressly authorize, direct, or even mention th[ose] expenditures." 551 U.S. at 605. The challenged expenditures "resulted from executive discretion, not congressional action." *Ibid.*; see *id.* at 615 ("[W]e have never extended [*Flast*'s] narrow exception to a purely discretionary Executive Branch expenditure."). If a discretionary expenditure by a government official made pursuant to a general spending program will not support taxpayer standing, then, *a fortiori*, a discretionary expenditure by a *private* taxpayer pursuant to a general tax credit provision will not.

The money that flows to religious institutions under Section 1089 does so as the result of multiple, independent private decisions rather than any legislative mandate. The statute establishes a neutral rule in which any eligible taxpayer can receive a tax credit for a donation to any eligible STO. The statute itself does not establish any STOs. It does not require that any STO provide scholarships to religious schools, and, in fact, it includes no textual references to religious institutions. The fact that respondents' fellow private citizens have utilized this neutral framework to create STOs that provide scholarships to students attending religious schools, and that other private citizens have independently contributed to those STOs, does not injure respondents in any legally cognizable way.

3. The court of appeals read this Court's decision in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), to provide that "taxpayers have standing to challenge a legislature's exercise of its taxing and spending power even when the legislature does not use that power to directly fund religious organizations, but instead uses the power to authorize third parties to fund such organizations." Pet.

App. 15a. In *Hein*, however, this Court rejected that reading of *Bowen*, noting that taxpayer standing existed in *Bowen* because the statute at issue there "not only expressly authorized and appropriated specific funds for grantmaking, [but] also expressly contemplated that some of those moneys might go to projects involving religious groups." 551 U.S. at 607. Indeed, the statutory text at issue in *Bowen* made four explicit references to the involvement of outside religious groups in the funding program it was establishing. 487 U.S. at 595-596.

Where, as in *Hein* and here, a statute includes no such express direction that government money flow to religious institutions, the required connection between the expenditures to which plaintiffs object and legislative action is absent. It makes no difference in this regard that the legislature enacting a statute free of references to religious institutions expects some of the money to flow to them. After all, that was precisely the case in *Hein*, where Congress had "informally 'earmarked' portions of its general Executive Branch appropriations to fund the offices and centers whose expenditures [were] at issue." 551 U.S. at 608 n.7. The Court deemed such non-textual evidence of the legislature's intent not "relevant" to the standing inquiry. *Ibid.* Finally, even if the court of appeals were correct that *Bowen* stood for the broad proposition that "taxpayer standing exists even when a legislature does not directly allocate funds to religious organizations, but instead mediates the funds through another agency," Pet. App. 14a, that rule would not support standing in this case. There is a fundamental difference between spending decisions made by a governmental "agency" (at issue in

Bowen) and one made by a private taxpayer (at issue here).[6]

4. A finding that respondents do not possess taxpayer standing would not alter several other established means for asserting Establishment Clause challenges. Many Establishment Clause cases are brought not by taxpayers, but by other injured parties. See, *e.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 294-295 (2000) (students objecting to prayers at school events); *Edwards* v. *Aguillard*, 482 U.S. 578, 581 (1987) (parents of school children challenging teaching of "creation science"); *Larson* v. *Valente*, 456 U.S. 228, 233-234 (1982) (church alleging discrimination among religious organizations in violation of Establishment Clause). And even with respect to taxpayers, "a taxpayer has standing to challenge the *collection* of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer." *Hein*, 551 U.S. at 599. Likewise, if a state were to authorize a tax credit for donations to religious schools only, a private secular school would likely have traditional Article III standing to challenge the pro-

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[6] The court of appeals also noted that on several occasions, this Court has reached the merits of Establishment Clause challenges both to programs that involved tax benefits and to programs that provide aid indirectly to religious institutions only by means of private choices. See Pet. App. 15a-16a; see also *id.* at 12a-13a. In none of those cases, however, did the Court address standing. As a result, they do not support extending the exception to the prohibition on taxpayer standing to a case like this one. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (noting "drive-by jurisdictional rulings of this sort * * * have no precedential effect"). In addition, each of those cases came before *Hein*, which limited *Flast* to its "facts" and "results" and established that the Court would not "expand[]" *Flast*. 551 U.S. at 609, 610, 615.

gram. See, *e.g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 8 (1989) (secular magazine had standing to challenge as "underinclusive" state sales tax exemption for only religious periodicals). In addition, "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution." *Asarco*, 490 U.S. at 617.[6] In any event, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge Christian Coll.*, 454 U.S. at 489 (brackets in original) (citation omitted).

II. SECTION 1089 IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

The court of appeals' decision should be reversed on the merits. The Establishment Clause (as applied to the States by the Fourteenth Amendment) "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648-649 (2002). Section 1089 has a manifestly secular purpose of increasing educational opportunities for Arizona's school children. And this Court has repeatedly held that neutral programs of private choice like this one do not have the impermissible effect of advancing religion, even when

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[6] The Arizona Supreme Court reached the merits of a taxpayer's Establishment Clause challenge to the statute at issue here without interposing any standing barrier. See *Kotterman*, 972 P.2d at 610-616; see also *Ethington* v. *Wright*, 189 P.2d 209, 212 (Az. 1948) (rejecting *Frothingham*'s prohibition on taxpayer standing).

some private participants choose to direct funding to religious institutions.

A. Section 1089 Does Not Have The Primary Purpose Of Advancing Religion

"The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984). "In each [of those] case[s], the government's action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action." *McCreary County, Ky.* v. *ACLU*, 545 U.S. 844, 863 (2005) (*McCreary County*); see *id.* at 864 (secular purpose "has to be genuine, not a sham, and not merely secondary to a religious objective"). As of 2005, the Court had found "government action motivated by an illegitimate purpose only four times" since adoption of the modern test for Establishment Clause claims in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *McCreary County*, 545 U.S. at 859. Each of those cases involved obvious, overt support for religion, namely governmental display of religious texts, government-sanctioned prayer, or religious instruction in public schools.[7]

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[7] See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (prayer at public school football games); *Edwards*, 482 U.S. at 581, 597 (teaching of "Creation Science" in the public schools); *Wallace* v. *Jaffree*, 472 U.S. 38, 40, 56-61 (1985) (period of silence in public school for "meditation or voluntary prayer"); *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam) (posting of Ten Commandments in public school class rooms). *McCreary County* became the fifth case; it involved the posting of the Ten Commandments in courthouses. 545 U.S. at 881.

The Court has described "cases involving state assistance to private schools" as "easily distinguishable" from those rare instances in which it has found an impermissible purpose, since "[s]uch assistance has the obvious legitimate secular purpose of promoting educational opportunity." *Stone* v. *Graham*, 449 U.S. 39, 43 n.5 (1980) (per curiam). Without exception, the Court has found (or noted that it was not disputed) that such education assistance programs have a secular purpose.[8] In particular, the Court has held that a "State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable." *Mueller*, 463 U.S. at 395.

There is nothing about Section 1089 that should make it the first education assistance statute ever found by this Court to have an impermissible religious purpose. As the district court correctly recognized, the Arizona statute's clear purpose is to "maximize parents' choices as to where they send their children to school." Pet. App. 54a; see *id.* at 111a-112a (dissent from denial of rehearing en banc) (same); *Kotterman*, 972 P.2d at 611-612 (same). The statute makes no mention of reli-

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[8] See *Zelman*, 536 U.S. at 649; *Mitchell* v. *Helms*, 530 U.S. 793, 808 (2000) (opinion of Thomas, J.); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 485-486 (1986); *School Dist. of City of Grand Rapids* v. *Ball*, 473 U.S. 373, 383 (1985); *Mueller*, 463 U.S. at 394-395; *Committee for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 654 (1980); *Wolman* v. *Walter*, 433 U.S. 229, 236 (1977) (opinion of Blackmun, J.); *Roemer* v. *Board of Pub. Works of Md.*, 426 U.S. 736, 754 (1976) (opinion of Blackmun, J.); *Sloan* v. *Lemon*, 413 U.S. 825, 825-826 (1973); *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973); *Levitt* v. *Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 479 n.7 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 678-679 (1971) (opinion of Burger, C.J.); *Lemon*, 403 U.S. at 613.

gion, and its legislative history confirms that the Arizona legislature's goal was to expand the types of educational opportunities that are available to Arizona families. See Committee on Ways & Means, Minutes of Meeting, Jan. 21, 1997 (43d Leg., 1st Reg. Sess.) at 7 (remarks of Rep. Anderson).

The court of appeals was of the view that respondents could prove that the legislature's stated secular purpose in enacting Section 1089 was a "pretense." Pet. App. 20a. According to the court of appeals, "Section 1089 could, on its face, be interpreted to require each STO to provide scholarships for use at any qualified private school, religious or secular." *Id.* at 19a. If, however, respondents could "prove" their "allegations" that "in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools," then the court of appeals thought they might be able to prove an impermissible religious purpose. *Id.* at 19a-20a.

As an initial matter, there is nothing for respondents to "prove" on this point; their "allegation" is confirmed by the face of the statute. Section 1089 requires only that STOs not limit their scholarships to students who attend only one qualified private school. See Section 1089(G)(3). By obvious implication, that means an STO can limit scholarships to students who attend at least two such schools. The Arizona Supreme Court was fully aware of this aspect of the statute when it rejected the facial challenge to it. See *Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting) ("[T]he statute does not prevent an STO from directing all of its grant money to a group of schools that restrict enrollment or education to a particular religion or sect.").

Nor does this completely neutral aspect of the statute suggest any non-secular purpose. STOs are permitted to restrict use of their scholarships to *any* group of two or more schools, not just religious schools. For example, an STO can limit its scholarships to a group of secular schools whose mission or philosophy it supports. See, *e.g.*, Jewish Tuition Org. Amicus Br. in Support of Cert. 15-16 (discussing STOs that select participating schools by their focus on special needs children or their use of Montessori or Waldorf pedagogy). The legislature reasonably could have concluded that permitting STOs to target their scholarships in this way would lead to greater contributions by donors who supported such educational philosophies. See *id.* at 17-18. There is no support for a finding that this is one of "those unusual cases where the claim [of secular purpose] was an apparent sham." *McCreary County*, 545 U.S. at 865.

B. Section 1089 Does Not Have The Primary Effect Of Advancing Religion Because It Is A Neutral Program Of Private Choice

The Court has repeatedly found that neutral programs that empower individuals to decide where government benefits will flow do not violate the Establishment Clause, even where some of those individuals use their discretion to choose religious institutions. Section 1089 is just such a program. The court of appeals failed to afford adequate constitutional significance to the role of private choice in Arizona's scheme and, as a result, erroneously believed the State, rather than private decisionmaking, was responsible for the assistance that flows to religious STOs and schools.

1. Neutral programs that permit individuals to direct aid to religious institutions are consistent with the Establishment Clause

This Court has consistently held that "neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing" do not have the primary effect of advancing religion. *Zelman*, 536 U.S. at 649. In such programs, "government aid reaches religious schools only as the result of the genuine and independent choices of private individuals." *Ibid.* As a result, any aid to religion that results from such a program "is reasonably attributable to the individual recipient, not to the government." *Id.* at 652.

This Court has applied this principle in a number of settings. In *Mueller* v. *Allen*, *supra*, the Court held that a state program that allowed parents to take a state tax deduction for tuition at private schools, whether religious or secular, was a neutral program of genuine private choice that was consistent with the Establishment Clause. 463 U.S. at 394-403. In *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court upheld the use of state vocational rehabilitation assistance for the visually impaired by a student who chose to study at a Christian college. *Id.* at 485-490. In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court found no Establishment Clause violation in a deaf student's use of his state-provided sign-language interpreter at a religious school. *Id.* at 10-14.

Most recently, in *Zelman*, this Court upheld an Ohio program that provided tuition aid for students to attend a participating private school. See 536 U.S. at 644-645. Any private school, whether religious or secular, could

participate in the program. See *ibid.* Consistent with *Mueller*, *Witters*, and *Zobrest*, this Court found the Ohio program lawful because it offered assistance to a broad class of individuals defined without reference to religion; permitted the participation of all schools within the district, religious or nonreligious; and made program benefits available to participating families on neutral terms, with no reference to religion. See *id.* at 653.

By these well-established standards, Section 1089 is a neutral program of private choice and is thus consistent with the Establishment Clause. It offers a government benefit—a tax credit—on a neutral basis without any reference to religion. The taxpayers who receive this benefit do so on the basis of their independent and voluntary contributions to the STO of their choice. The statutory authorization for STOs is likewise entirely neutral. Anyone can form an STO, and each STO makes its own private decision whether to provide scholarships to students of all private schools, or a subset—whether secular or religious. The benefit that religious schools receive through this program is not directed by the State; it is instead the result of several layers of private decisions. See Pet. App. 94a ("In every respect and at every level, these are purely private choices, not government policy."); *Kotterman*, 972 P.2d at 614 ("The decision-making process is completely devoid of state intervention or direction."). "[N]o reasonable observer would think [this] neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Zelman*, 536 U.S. at 655; see Pet. App. 94a.

2. *The court of appeals failed to recognize the role individual choice plays in Section 1089*

The court of appeals' fundamental error was in failing to recognize that the independent private choices of taxpayers who provide funds to STOs ends the State's involvement and thus the Establishment Clause inquiry. See *Zelman*, 536 U.S. at 652 (where the government's "role ends with the [neutral] disbursement of benefits," any advancement of religion is not attributable to the government); Pet. App. 90a. The scholarship-funding policies of the STOs are constitutionally irrelevant; they are not dictated by the State nor are they policies created by state actors. Instead, they are themselves the results of private decisionmaking. Such policies are no more a concern of the Establishment Clause than are the policies of the churches or myriad religious charities that receive money due to the federal tax deduction for charitable contributions. See *Hernandez* v. *Commissioner*, 490 U.S. 680, 696 (1989) (federal tax deduction for charitable contributions does not violate Establishment Clause because it "is neutral both in design and purpose" and its "primary effect"—"encouraging gifts to charitable entities, including but not limited to religious organizations—is neither to advance nor inhibit religion"); see *Zelman*, 536 U.S. at 666 (O'Connor, J., concurring) (noting that "over 60[%] of household charitable contributions go to religious charities").[9]

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[9] The court of appeals perceived a difference between tax credits and tax deductions. See Pet. App. 26a n.12. While there are clearly "mechanical differences" between the two, they are not "constitutionally significant." *Kotterman*, 972 P.2d at 612. "Though amounts may vary, both credits and deductions ultimately reduce state revenues, are intended to serve policy goals, and clearly act to induce socially ben-

a. The court of appeals repeatedly attempted to distinguish Section 1089 from neutral school assistance programs upheld by this Court on the ground that Arizona does not provide aid directly to parents, but instead provides tax credits to taxpayers for donations to STOs, which in turn provide aid to parents. See *e.g.*, Pet. App. 28a, 29a, 32a n.14, 35a. But there is no logical reason why this Court's well-established recognition that private decisionmaking is insulated from constitutional challenge should be limited only to benefits the government provides to parents. To be sure, the facts of *Zelman* involved choice by parents, but the principle it articulated is not limited to them. Private choices made under a neutral government aid program break the circuit between government and religion. There is no principled basis for following that rule when the private choices are made by parents and not when they are made by taxpayers, especially given the "broad latitude" this Court's decisions have given legislatures "in creating classifications and distinctions in tax statutes." *Mueller*, 463 U.S. at 396 (quoting *Regan*, 461 U.S. at 547).

The court of appeals thought it constitutionally significant that "parents' choices are constrained by those of the taxpayers exercising the discretion granted by

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official behavior." *Ibid.* (internal quotation marks and citation omitted). Moreover, the bright line the court of appeals apparently perceived between the economic value of deductions and credits can be dim in practice, given that deductions can provide significant tax savings to high-income taxpayers, Pet. App. 89a n.3, while tax credits can be less than dollar for dollar, see, *e.g.*, 72 Pa. Cons. Stat. Ann. § 8705-F(a) (West Supp. 2010) (providing Pennsylvania businesses with a 75% tax credit for contributions to school tuition organizations); 26 U.S.C. 25A(c)(1) (providing 20% tax credit for tuition payments pursuant to a Lifetime Learning credit).

Section 1089." Pet. App. 29a; see *id.* at 32a (evaluating neutrality of program "from the parents' perspective"). But *Zelman* held that an aid program is unlawful only if *the government* constrains the choices of parents in order to favor religious education. See 536 U.S. at 650; Pet. App. 97a. It was not relevant in *Zelman* that Cleveland parents' choices were constrained by the private decisions of schools that resulted in "more private religious schools" than secular ones "participat[ing] in the program." 536 U.S. at 656; see *id.* at 707 (Souter, J., dissenting) ("For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious."). And it is not relevant here that parents' choices are "constrained" by the contribution choices of taxpayers or the policies of private STOs. See Pet. App. 59a, 100a-102a.

In keeping with its erroneous focus on "constraints" placed on parents, the court of appeals concluded that Section 1089 failed the neutrality test because "the choice delegated to taxpayers under [the statute] channels a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools." Pet. App. 22a. The recipients of the tax credit are free to make contributions to any STO, religious or secular, and the tax credit provision is scrupulously neutral on that question. *Id.* at 57a. The fact that many taxpayers have exercised their private discretion to make contributions to religious STOs is not relevant. "[T]he constitutionality of a neutral choice program does not turn on annual tallies of private decisions made in any given year by thousands of individual aid recipients." *Zelman*, 536 U.S. at 657 n.4. The Court has repeatedly rejected numerical arguments just like the one credited by the court of appeals. See *id.* at 658

(declining to "attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools"); *Mitchell* v. *Helms*, 530 U.S. 793, 812 n.6 (2000) (opinion of Thomas, J.) ("[T]he proportion of aid benefitting students at religious schools pursuant to a neutral program involving private choices [is] irrelevant to the constitutional inquiry."); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

b. The court of appeals also erred by viewing Section 1089 as a "delegation" of government power to the tax credit recipients. Pet. App. 40a. The court read *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982), as requiring a finding that this "delegation" was impermissible, absent "reasonable assurance that" the tax credit recipients' "choices will advance the secular purposes of the statute." Pet. App. 40a. The court of appeals misapplied *Larkin*, in which "important governmental power—a licensing veto authority—had been vested in churches." *Lynch*, 465 U.S. at 683. That kind of delegation, the Court held, wrongly "enmeshes churches in the exercise of substantial governmental powers," *Larkin*, 459 U.S. at 126, and creates an impermissible "fusion of governmental and religious functions." *Ibid.*

Unlike the statute at issue in *Larkin*, Section 1089 does not delegate any core government function to a religious institution. Making contributions to private scholarship organizations is not a "power ordinarily vested in agencies of government." *Larkin*, 459 U.S. at 122; see Pet. App. 109a n.20. And the pertinent decision here is made by individual Arizona taxpayers, not

churches or other religious institutions. This Court upheld a similar tax benefit program in *Mueller*, *supra*, without any concerns about delegation. The court of appeals' theory also conflicts with this Court's decision in *Hernandez* v. *Commissioner*, *supra*, which found the federal tax deduction for charitable contributions consistent with the Establishment Clause, 490 U.S. at 696, even though it includes no assurances that those claiming the deduction did not make their charitable contributions with sectarian motives.

c. The court of appeals viewed this case as distinguishable from *Zelman* because the school voucher program at issue there gave parents "incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations, such as whether to promote the religious mission of a particular school." Pet. App. 40a. The court of appeals provided no citation to support this reading of *Zelman*, and it is not accurate. The program upheld in *Zelman* allowed parents to use a state tuition voucher at any school they wished—secular or religious—and provided *no* incentives or special benefits for choosing a school based on educational rather than religious reasons. Parents were free to use whatever criteria they wanted to in making their choice. See *id.* at 109a.

The court of appeals thought that Arizona's decision to give decentralized taxpayers, rather than "government administrators," discretion to decide which STOs to finance "appears to thwart * * * the secular purpose of the program." Pet. App. 44a. This concern is little more than a policy disagreement, and it flies in the face of the "substantial deference" the courts owed to a state's decision how best to "encourage desirable expenditures for educational purposes." *Mueller*, 463 U.S. at

396. Arizona reasonably concluded that permitting taxpayers to make these decisions would maximize their incentive to make contributions, thus increasing the funds available for scholarships. If that conclusion has resulted in "demand for STO-provided scholarships available for use at secular schools markedly outstrip[ping] their supply," Pet. App. 44a; but see Arizona Christian Sch. Tuition Org. Br. 57 n.21, that is merely the result of private decisionmaking that is beyond the purview of the Establishment Clause.

d. Finally, the court of appeals erred by failing to examine Section 1089 in the context of Arizona's diverse array of programs that promote educational options. See *Zelman*, 536 U.S. at 655-656 ("The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school."); see also Pet. App. 103a-106a. "The Arizona Legislature has, in recent years, expanded the options available in public education." *Kotterman*, 972 P.2d at 611. The State has established charter schools to "provide additional academic choices for parents and pupils." Ariz. Rev. Stat. Ann. § 15-181.A (2009); see Jewish Tuition Org. Amicus Br. in Support of Cert. 20 (noting that charter schools comprise a quarter of the public schools in Arizona and enroll ten percent of the State's public school population). It also requires all public school districts to have open enrollment policies without charging tuition, thus opening their doors to students from other districts (subject to capacity). Ariz. Rev. Stat. Ann. § 15-816.01.A (2009); Pet. App. 57a. In addition, Arizona provides a $200 tax cred-

it for fees paid to public schools for extracurricular activities and character education. Ariz. Rev. Stat. Ann. § 43-1089.01 (Supp. 2009). Section 1089 thus does not stand in isolation, but instead is emblematic of Arizona's decision to "bring private institutions into the mix of educational alternatives open to the people of [the] state." *Kotterman*, 972 P.2d at 611.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2010

AMICUS CURIAE BRIEF

Nos. 09-987, 09-991

IN THE
SUPREME COURT OF THE UNITED STATES

ARIZONA CHRISTIAN SCHOOL TUTION ORGANIZATION,
Petitioner,

v.

WINN ***et al.,***
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AGUDATH ISRAEL OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government – federal, state, and local.

[1] All parties have consented to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members or its counsel made such a monetary contribution. We thank Rivkah Morgenstern, a student at Cardozo Law School, for her assistance with the research and writing of this brief.

legislative, administrative, and judicial (including through the submission or participation in amicus curia briefs) – to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general.

One of Agudath Israel's roles in this connection is to serve as an advocate for Jewish schools and Jewish education, which Orthodox Jews see as both a personal religious obligation and a critical factor – perhaps the critical factor – in ensuring Jewish religious continuity. The overwhelming majority of Agudath Israel's constituents choose to send their children to the approximately 700 Orthodox Jewish day

schools across the country that collectively educate over 200,000 students. There are students in Jewish schools in Arizona who have benefited from donations received under the Arizona tax credit program.

In this case, the court below ruled that a facially neutral tax credit was unconstitutional simply because most taxpayers chose to donate to School Tuition Organizations (STOs) that provided tuition assistance to students at religious schools. The court concluded that the result of these private choices raised a valid Establishment Clause challenge to the tax credit.

Agudath Israel respectfully submits this *amicus curiae* brief in support of the Arizona Christian STO because the decision

below turns the Establishment Clause on its head and creates a very real risk of the precise entanglement that it seeks to avoid – essentially requiring that the government take a hand in limiting the proliferation of religious organizations, or even distributing benefits only after an inquiry into the religious intentions of individual recipients.

ARGUMENT

I. THE NINTH CIRCUIT MISREADS *ZELMAN* AND CREATES AN UNPRECEDENTED AND INAPPROPRIATE DISTINCTION BETWEEN TAXPAYER AND PARENT

A. Misunderstanding *Zelman*

There is little question that the constitutional propriety of Ariz. Rev. Stat. Ann. § 43-1089(G)(2)-(3) (2005) ("Section 1089") is determined under the rubric set forth in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and the argument is compelling that Section 1089 is squarely covered by that

precedent. In order to distinguish *Zelman*, the Ninth Circuit was forced to engage in a convoluted and artificial argument that draws a line between the taxpayer[2] and the parents. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009)

In *Zelman*, the vouchers were offered directly to "parents or students, as the beneficiaries of the program's aid," *Id.* at 1018, and only then passed on to the (possibly sectarian) schools. *See Zelman*, 536 U.S. at 646. The true private choice of the parents served to insulate the government from the sectarian institutions, avoiding the appearance of an endorsement and avoiding

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[2] "Taxpayer" here refers to an individual taxpayer taking advantage of the tax credit available under Section 1089, as distinct from the "Taxpayer," under which aegis Plaintiff brings suit and with respect to which the Ninth Circuit passed on standing to bring suit.

the "*imprimatur* of government endorsement." *Id.* at 655.

The Ninth Circuit misconstrues the reason that the parent's choice "breaks the circuit," perceiving it to do that work because the parent's incentive was to "best use the program aid to assist *their* children . . . based on their children's educational interests instead of on sectarian considerations." That is to say, the circuit is broken because parents have secular – or at least non-sectarian – motivations, and therefore the decisions of the parents, when imputed back to the government by the reasonable and informed observer, will not stain the government with the ink of entanglement. *Winn*, 562 F.3d at 1021.

That reading of *Zelman* is wrong at its core. The very heart of the *Zelman* rubric is not that the choices made by the individuals must be understood to be non-sectarian, but that the very fact of the individual's discretion insulates the government, even where the choices made are overwhelmingly sectarian. *Zelman*, 536 U.S. at 650, 652.

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious

> institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the dissemination of benefits.

Id. at 652. In fact, as explicitly stated in *Zelman*, even where virtually all of the benefits eventually inure to sectarian recipients, the Establishment Clause is not implicated so long as it is the individual, and not the government, who makes that selection. *Id.* at 649-50 (citing *Mueller v. Allen*, 463 U.S. 388 (1983)).

Under *Zelman* the individual's (possibly sectarian) choice takes that decision away from the government: the government's involvement "ends with the disbursement of benefits." *Id.* The Ninth Circuit opinion, however, misunderstands *Zelman* to hold that the individual's choice is made in the shoes of the government: under that misunderstanding the government is still exercising discretion, but only through the mechanism of individual choice, and so the sectarian decisions of the individual are imputed back.

B. Inventing an Untenable and Irrelevant Distinction

Misunderstanding *Zelman* and its antecedents as it does, the Ninth Circuit is

then required to read those cases as looking to the intentions and motivations of the individual decision makers. The Ninth Circuit opinion in the instant case posits a disconnect between the taxpayer – who distributes the benefits – and the parent, who is the indirect recipient thereof. Based on that distinction, the Ninth Circuit understands that the independent choices of the taxpayer (made without the benefit of the parent's secular motivations) will be insufficient to break the circuit, and the taxpayer's acts and motives will be imputed to the government. Because the majority of STOs are sectarian, the taxpayer's motivations are then assumed to be sectarian, and the Ninth Circuit would read

those motivations to reflect back on the State. *Winn*, at 1022-23.

The distinction posited by the court below, however, is both untenable and irrelevant. The distinction is untenable in two related ways. First, there is nothing that the court points to that can support the assertion that the parents' or students' interests in *Zelman* or its antecedents were particularly non sectarian. In fact, it can be presumed that those challenges were themselves brought primarily because the parents' interests were demonstrating themselves to be very sectarian. *See, Mueller v. Allen*, 463 U.S. 388 (1983)(96 percent of program beneficiaries were parents of children in religious schools); *see*

also Witters v. Washington Dept. of Serv's for Blind, 474 U. S. 481 (1986)(scholarship recipient studying at a religious institution to be a pastor); *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1 (1993)(challenge directed at recipients of benefits in religious schools).

The Ninth Circuit opinion simply plucks from the ether a non-sectarian motivation for the decision makers in these cases and then claims that the non-sectarian nature of that motivation insulates the government.

At the same time, the court below can point to nothing in law, fact, or reason that can support its arbitrary descriptions of taxpayer motivations. Nothing supports the

apparent assumption by the court below that the taxpayer will not have the same non-sectarian motivations as a parent, seeking to support educational excellence or a particular secular study.[1]

The parent-taxpayer distinction is irrelevant for related reasons. The only relevant inquiry under *Zelman* is whether or not the individuals who are distributing the funds or benefits are making independent decisions in a manner sufficient to keep the *imprimatur* of the government away from any sectarian interest. The only individuals who could be making such decisions are

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[1] The rationale of the court below for attributing sectarian motivations to the taxpayers cannot be the (apparent) relative success of religious STOs, because that rationale is backwards. The prevalence of religious STOs (or schools) is necessarily the result of the individual choices made, not the cause. Further, without some ancillary support that result cannot be read to prove some insidious or sectarian intent

those that are directing that aid. *See Zelman*, 536 U.S. at 669 (O'Connor, J., concurring)(describing the "beneficiaries of indirect aid" as precisely those who "determin[e] the organization to which they will direct that aid.")

The recipients of STO scholarships (and their parents) have no possible mechanism by which to somehow implicate the government in sectarian shenanigans. The act of receiving money or benefits could not cause an objective observer to perceive a government involvement in religion. Rather, it must be the taxpayers who can, by their distribution of benefits, make such an implication possible and who can, by their independent choice, insulate the

government. Even under the false and misguided dichotomy created by the Ninth Circuit, the relevant inquiry and the Constitutional analysis pertains to only one category – the taxpayer.[1] It is the taxpayer's choice that must be evaluated for its actual and apparent independence from government influence. If the taxpayer's choice is, in fact, a "genuine and independent private choice," *Zelman*, at 652, then under both precedent and reason Section 1089 raises no difficulties under the Establishment Clause, even as applied.[2]

[1] The Ninth Circuit analysis further elides the strong likelihood that there is a significant overlap between "taxpayers" and "parents of children receiving STO scholarships."

[2] There are three other "layers" of independent decisions that further insulate the government from any hint of entanglement. "First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide to provide scholarships to religious schools. . . . Finally, parents need to apply for a scholarship for their student."

C. The Ninth Circuit's Mistake Forces More Government Entanglement

As discussed, the Ninth Circuit's misunderstanding of *Zelman* and invention of the parent-taxpayer distinction have the paradoxical effect of requiring that the independent decision makers have (and prove) a non-sectarian purpose to their decisions.

The question that must be asked is what sort of statute could possibly meet that requirement. To comply with such a rule, a State wishing to enact a program like the one at issue would have to require from every taxpayer taking advantage of the

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Id. at 582 F.3d at 662 (9th Cir. 2009) (en banc) (O'Scannlain J. dissenting from the refusal to rehear the case en banc)

program some sort of representation (perhaps under oath) to the effect that their mind is devoid of any sectarian or religious intent, regardless of the final destination of the donation.

Very few actions by the government would more forcibly implicate the Establishment Clause than an annual inquiry into the religious convictions of every taxpayer, except perhaps an annual inquiry into those convictions with an effective penalty attached to the "wrong" answer.

Far from working against government entanglement in the institutions of religion, the Ninth Circuit's opinion establishes a regime under which the government must involve itself intimately with the religious

lives of its citizens – precisely the sort of outcome that the Establishment Clause is intended to prevent.

II STRIKING DOWN A FACIALLY NEUTRAL PROGRAM SOLELY BECAUSE RELIGIOUS INSTITUTIONS BENEFIT SIGNIFICANTLY EVINCES A HOSTILITY TO RELIGION AND POTENTIALLY THREATENS MANY OTHER GOVERNMENT PROGRAMS

In the instant case, no one contests the validity of Section 1089 on its face; the statute clearly does not violate the Establishment Clause as drafted. The challenge is to the statute as applied. To

sustain that challenge, the Ninth Circuit's decision rests on the additional allegations made in the trial court. Those allegations are: first, that the STOs receiving the taxpayer donations have chosen to limit the schools to which they offer scholarships; second, that the largest STOs restrict their scholarships to sectarian schools. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1005-06 (9th Cir. 2009) (panel).

In countenancing an "as applied" challenge premised solely on the existing fact of the distribution of aid recipients as between secular and sectarian, the Ninth Circuit undermines a tremendous swathe of Establishment Clause jurisprudence. It cannot be that a statutory

scheme that passes constitutional muster at one point in time can be rendered unconstitutional by a shift in demographics. As this Court has made clear time and time again, statistics should not be relevant to the constitutional inquiry:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

Mueller v. Allen, 463 U.S. 388, 401 (1983). The only relevant question should be whether the program on its face deliberately skews aid towards religion. If not, it is

irrelevant that through "genuine and independent private choice" the bulk of aid is directed to religious institutions. *Zelman*, 536 U.S. at 652.

Under the lower court's analysis, a facially neutral statute could be challenged two, five, or ten years after enactment if at any time it could be shown statistically that at the moment the challenge is brought religious institutions happen to be the majority of recipients or even just a very significant beneficiary. In such a case, the lower court's "reasonable observer" might be held to conclude that the program impermissibly aids religion.

In reality, the lower court's "reasonable observer" test fails to impute

to the reasonable observer basic high school economic knowledge. A truly reasonable observer would understand in the instant case that the high percentage of STO donations benefiting religious school students is merely a function of supply and demand. Most private schools are religious simply because a private education is expensive and only those few who can either afford the costs or feel a religious imperative to provide their children with a religious education regardless of the cost will send their children to private schools. "[T]he preponderance of religiously affiliated private schools ... is a phenomenon common to many American cities." *Zelman*, 536 U.S. at 656-57. Such a reasonable observer would

understand that it is not government that is directing the bulk of the tax credit encouraged funding to religious schools, but the social and economic reality that most private schools are religious schools. As this Court already stated in *Zelman*, it is simply not relevant "whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious schools." *Id.* at 658.

Allowing "as applied challenges" like the one before this court could thus jeopardize other government programs that benefit religious institutions based solely on statistical analysis as to who benefits from a particular program. Other

tax credit programs, property tax exemptions for religious institutions, certain government aid programs, and even some tax deduction provisions could potentially be challenged anytime a litigant could marshal evidence as to the preponderance of religious institutions that benefit from a particular program. The ability of religious organizations to raise funds central to their very existence would be threatened. And the message to the millions of Americans who send their children to religious schools and support religious institutions would be that their government now evinces "special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the

mistake of being effective in transmitting their views to children." *Mitchell*, 530 U.S. 793, 827-28 (2000) (plurality opinion). That, we submit, is not what the Establishment Clause, as interpreted by this Court, would mandate.

CONCLUSION

Agudath Israel of America respectfully urges the court to reverse the decision of United States Court of Appeal for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 6th day of August, 2010

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Court, U.S.

AUG 6 - 2010

OFFICE OF THE CLERK

Nos. 09-987, 09-991

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, ET AL.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici.

ACLJ attorneys often contend with arguments based upon misreadings of the Establishment Clause of the First Amendment. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (rejecting invocation of Establishment Clause as justification for viewpoint-based discrimination against private religious speech). Unduly lax standing rules under the Establishment Clause facilitate misuse of that Clause to attack legitimate government programs that, like the tuition tax credits in this case, make important benefits available in a religion-neutral manner. Moreover, allowing special lax taxpayer standing rules *only* for Establishment Clause claims warps the legal playing field: programs that neutrally *include* religiously oriented participants are subject to taxpayer challenge, while programs that *exclude* religion, in favor of monochromatic secularity, are immune from taxpayer suits.

The ACLJ therefore strongly believes in the need

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[1] The parties to this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

for this Court to police the proper boundaries of Article III standing in Establishment Clause litigation.

This Court explained in *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007), that the standing exception created in *Flast v. Cohen*, 392 U.S. 83 (1968), is to be narrowly construed. In the present case, the Ninth Circuit has, contrary to this Court's directions, doubly expanded the *Flast* exception; first, to let taxpayers sue, not for a legislative expenditure, but for a mere failure to tax, i.e., by conferral of a tax credit; and second -- contrary to *Hein* -- to let taxpayers challenge, not a legislative appropriation, but rather the administration of that program. This Court should decline the invitation to expand *Flast*, reverse the Ninth Circuit, and remand with instructions to dismiss for want of standing.

SUMMARY OF ARGUMENT

If this Court reaches the merits, it should reject respondents' Establishment Clause challenge to the Arizona tuition tax credit. Respondents concede the program's facial constitutionality. Their challenge to the statute "as applied" must fail because the "application" in question -- the placing of school eligibility limits on scholarships -- is imposed by private actors. Hence, the as-applied challenge fails for want of state action.

This Court should not even reach the merits, however, because respondents lack Article III standing to bring this case.

Respondents assert standing as state taxpayers, invoking this Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968). *Flast*, however, created a narrow exception to the general and well-established rule that taxpayer standing is insufficient to invoke federal jurisdiction. This Court has never endorsed an expansion of that exception. Yet for respondents to prevail would require not one but two extensions of *Flast*.

First, *Flast* only allowed a challenge to expenditures, while this case involves not an expenditure, but a nonrefundable tax credit -- a decision not to tax. Second, *Flast* only allowed challenges to *legislative* expenditures, while this case involves the *administration* of funds, a matter this Court has held to fall outside the scope of *Flast*.

To confer standing upon respondents here would fly in the face of this Court's repeated refusal to extend the narrow *Flast* exception. Given the doctrinally questionable status of *Flast*, in light of this Court's subsequent cases, *Flast* is no candidate for such an expansion.

ARGUMENT

I. THE DECISION BELOW IS MANIFESTLY WRONG ON THE MERITS.

On the merits, this is a straightforward case. Respondents concede the facial constitutionality of

Arizona's tax credit program,[2] under which donors to student tuition organizations (STOs) get a state tax credit, and the STOs in turn provide scholarships to students, including students who attend private religious schools.

All that remains, then, is respondents' challenge to the program *as applied*, focusing upon the fact that some STOs limit their scholarships to students attending religious schools. Opp. at 15, 21. That challenge can be understood in two ways, both of which plainly fail.

First, the as-applied challenge could be understood as attacking particular STOs and their decisions to limit the universe of scholarship recipients. *See* ACSTO Br. at 7a (transcript of excerpts of oral argument in Ninth Circuit) (Mr. Bender for challengers: "We only challenge the administration of it by religion-specific STOs"); Opp. at 15 ("The features of the program's operation that are the primary bases of respondents' challenge [are] the award of scholarships that can be used only in religious schools . . ., the effect of [those award choices], and the failure of the program to achieve its purported secular objectives"); *id.* at 21 (decision below is "based on the allegations that the majority of Arizona's scholarships are *awarded* to parents on the basis of religion . . . that those awards *require* parents to send their children to

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[2] This concession, made in oral argument before the Ninth Circuit, appears at approximately minute 49 of the argument recording as posted on the Ninth Circuit's website. *See also* ACSTO Br. at 7a (transcript excerpt). Respondents repeated the concession before this Court. Opp. at 15.

religious schools, and that the Arizona program [fails] its purported, non-religious purposes") (emphasis in original). But the decision of private STOs, like the decision of donors who choose to support them, are all *private* actions which the Establishment Clause does not restrict. The lack of state action thus dooms an as-applied challenge attacking the decisions of STOs and taxpayers.

Second, the as-applied challenge could be understood as attacking the absence of a statutory provision requiring all STOs to include students who attend nonreligious schools. Such an absence, however, is an assertion that the text of the statute is defectively incomplete; that sort of claim is incompatible with respondents' disavowal of any facial challenge. *See* Opp. at 15 ("the present case . . . is an *as applied* challenge, *not to the statute's text*, but to the program as it actually operates") (emphasis added in part).[3]

In sum, if this Court reaches the merits, it should reverse the Ninth Circuit in short order.

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[3] If respondents' argument is that Arizona must *administratively* require all STOs to award scholarships at both religious and nonreligious schools, this is just another way of saying that the statute, standing alone (*i.e.*, without remedial administrative steps), is defectively incomplete on its face.

If respondents' argument is that the pertinent statute should or must be *construed* to bar STOs from limiting their scholarship recipients (whether to religious or to nonreligious schools -- the freedom of STOs operates in both directions), then respondents should be seeking declaratory relief from the state supreme court, the only judicial body competent to construe the statute definitively. *But cf.* ACSTO Br. at 48-49 (suggesting such a statutory construction is precluded).

But the decision below also fails for an important, threshold jurisdictional reason, namely, lack of standing.

II. THE DECISION BELOW MUST BE REVERSED FOR RESPONDENTS' LACK OF TAXPAYER STANDING.

The general rule is that being a taxpayer does not by itself suffice to confer Article III standing to challenge federal government actions. *Frothingham v. Mellon*, 262 U.S. 447 (1923). The same rule applies to state taxpayers challenging state government actions. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006). Respondents -- who rely exclusively upon state taxpayer status for their standing -- do not fit into any exception that would bestow standing here. In particular, the narrow exception recognized in *Flast v. Cohen*, 392 U.S. 83 (1968), for certain claims brought under the Establishment Clause, does not cover and should not be expanded to cover respondents' claims.

A. *Flast* Created a Narrow Exception to the General Rule That Being a Taxpayer Is Insufficient for Article III Standing.

In *Frothingham*, this Court ruled that federal taxpayer status is insufficient to confer standing to challenge government action. 262 U.S. at 486-88. While the *Flast* decision subsequently opened up an exception for certain Establishment Clause claims, this Court has countenanced no other exception to the rule of *Frothingham*. On the contrary, this Court has repeatedly rejected such pleas of federal taxpayer standing. *See United States v. Richardson*, 418 U.S.

166 (1974) (no taxpayer standing to sue under Statement and Account Clause); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (no taxpayer standing to sue under Incompatibility Clause); *Cuno*, 547 U.S. at 347-49 (no taxpayer standing to sue under Commerce Clause). *See also Hein v. Freedom From Religion Found.*, 551 U.S. 587, 599 (2007) (plurality) ("We have consistently held that . . . the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to . . . Article III standing") (quoted text reordered). Importantly, even in the context of Establishment Clause claims, this Court has refused to expand *Flast* beyond the contours of that case. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (no taxpayer standing to bring Establishment Clause challenge to exercise of federal power under Property Clause, as opposed to Taxing and Spending Clause); *Hein* (no taxpayer standing to bring Establishment Clause claim in absence of challenge to specific legislative appropriation).

In short, the *Flast* exception is quite narrow. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (*Flast* created a "narrow exception . . . to the general rule against taxpayer standing"); *Cuno*, 547 U.S. at 348 (*Flast* has a "narrow application in our precedent"). Indeed, "the *Flast* exception has largely been confined to its facts . . . . In effect, we have . . . limited the expansion of federal taxpayer . . . standing . . . to an

outer boundary drawn by the results in *Flast*." *Hein*, 551 U.S. at 609-10 (plurality) (editing marks and citations omitted).

B. The *Flast* Exception Should Not Be Expanded to Authorize Taxpayer Challenges to Tax Credits or to the Administration of Tax Credits.

To create Article III standing for respondents in this case would require at least a two-step expansion of the narrow *Flast* exception. This Court should decline that invitation and adhere to its practice of limiting *Flast* to its facts.

1. This Case Involves Nonrefundable Tax Credits, Not Appropriations.

Respondents would first extend *Flast* from expenditures and appropriations to nonrefundable tax credits. This Court has never done so.

As *Cuno* illustrates, the general rule against taxpayer standing presumptively applies to tax credits. *See* 547 U.S. at 342 (challenge was to "franchise tax credit"). Notably, the *Cuno* Court left open the question whether tax credits even count as expenditures in the first place for purposes of the *Flast* exception. *Id.* at 347 ("Quite apart from whether the franchise tax credit is analogous to an exercise of congressional power under Art. I, § 8, plaintiffs' reliance upon *Flast* is misguided"). In fact, neither *Flast* nor *Bowen v. Kendrick* – the only cases in which this Court has upheld taxpayer standing under *Flast* – involved tax credits.

To be sure, this Court has entertained *on the merits* at least one Establishment Clause challenge (in part) to tax credits that presumably rested on taxpayer standing. *See Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).[4] *See also Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (Establishment Clause challenge by payer of property tax to city's conferral of tax *exemptions*); *Mueller v. Allen*, 463 U.S. 388 (1983) (Establishment Clause challenge by taxpayers to tax *deductions*). But this Court did not address standing in any of these cases. The mere exercise of jurisdiction is not precedent for the existence of jurisdiction. "'The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions -- even on jurisdictional issues -- are not binding in future cases that directly raise the questions.' *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted)." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006).

Certainly a *refundable* tax credit -- i.e., one pursuant to which, if the credit exceeds the taxpayer's tax liability, the government disburses the balance to the taxpayer -- will entail expenditures. But a *nonrefundable* tax credit -- as is at issue here, *see* ACSTO Pet. App. 112a-113a (setting forth statute)

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[4] *Nyquist* was not solely a taxpayer challenge to tax credits. The case involved a challenge by taxpayers *and parents* to tax credits *and direct money grants*. 413 U.S. at 762. This Court did not address standing.

(excess credit may only be carried forward, and only for five years) -- involves no government outlay of money. And while a tax credit does represent a government *declining* to take private funds into government coffers, that characterization has no logical stopping point. If a tax credit is deemed an "expenditure," then so presumably are deductions and exemptions, by which the government also declines to tax as far as it theoretically could. *But see Walz*, 397 U.S. at 675 ("The grant of a tax exemption . . . does not transfer [government] revenue . . . but simply abstains from demanding [support]"). The reduction or repeal of a tax (such as the death tax) would likewise be an "expenditure" under this theory. In fact, the failure to adopt a tax in the first place (such as a head tax on attendees at assemblies) would be an "expenditure" as well. In each case, the government decides as a policy matter what to tax, and what tax breaks to offer. That does not make all such decisions "expenditures" within the meaning of the *Flast* exception.

In a system where all money and property belongs to the state, and private citizens retain use of that money and property only by government indulgence, it might conceivably make sense to treat a reduction in tax as an expenditure. But the United States is not such a system.

This Court should reject the proposed expansion of *Flast* from expenditures to tax credits.

2. This Case Involves Administration of a Program, Not a Specific Legislative Enactment.

The *Hein* case clarified that the *Flast* exception does not apply to executive administration of funds, as opposed to specific legislative appropriation (as in *Flast*) or particular, express legislative authorization of expenditures (as in *Bowen v. Kendrick*[5]). Here respondents challenge, not the statutory program itself, but its administration. Opp. at 15. Hence, conferring standing on respondents would require expanding *Flast* in a second way that would require overruling *Hein*. Again, this Court should reject the invitation to enlarge the *Flast* exception, especially in a manner already rejected by this Court.

C. The *Flast* Precedent Is a Particularly Unsuitable Candidate for Expansion.

As this Court has ruled, the narrow *Flast* exception should not be expanded beyond its facts. *Flast*'s highly problematic status as a precedent reinforces the wisdom of this course of restraint.

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[5] As explained in *Hein*, the statute challenged in *Bowen v. Kendrick* expressly contemplated religious involvement. *Hein* distinguished *Bowen* on that basis. 551 U.S. at 606-07 & n.6 (plurality). *Bowen* is distinguishable here on the same grounds. The Arizona tax credit statute makes no mention of religious recipients. ACSTO Pet. App. 115a (setting forth statute) (defining STOs without reference to religion).

1. The *Flast* Rule Is Illogical on its Own Terms.

First of all, the *Flast* decision is not logically coherent.

The *Flast* Court declared that it would recognize an exception to *Frothingham* when taxpayers could demonstrate "the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Flast*, 392 U.S. at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

392 U.S. at 102-03.

But as Justice Harlan pointed out in dissent, the two-part test set forth in *Flast* is "not in any sense a measurement of any plaintiff's interest in the outcome of any suit." *Id.* at 121 (Harlan, J., dissenting). As Justice Harlan explained regarding the first prong of the *Flast* test -- the requirement that the attack be upon a direct expenditure, not just an incidental outlay -- "it surely cannot matter to a taxpayer *qua* taxpayer whether an unconstitutional expenditure is used to hire the services of regulatory personnel or is distributed . . . as grants-in-aid." *Id.* at 123. The taxpayer's "interest as taxpayer arises, if at all, from the fact of an unlawful expenditure, and not as a consequence of the expenditure's form." *Id.* Justice Harlan perceived the second *Flast* prong -- the requirement that the claim arise under a specific limitation on the spending power -- as similarly irrelevant. *Id.* "The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a 'specific limitation' upon Congress' spending powers." *Id.* As Justice Harlan noted, a plaintiff's interest in the suit does not "vary according to the constitutional provision under which he states his claim." *Id.* at 124.

In sum, *Flast*'s rule does not even follow from its own premises. Furthermore, as demonstrated below, *Flast*'s legal analysis has fared poorly in the test of time.

2. This Court Has Rebutted Each of the Arguments the *Flast* Court Relied upon to Confer Standing.

The propositions the *Flast* opinion offered to support its exception to the usual standing doctrine have been thoroughly undermined by this Court's later decisions, leaving *Flast* with no doctrinal legs to stand on.

a. This Court Has Expressly Rejected *Flast's* Core Premise.

While the two-part *Flast* test purported to give specific meaning to taxpayer standing doctrine, the lynchpin of the *Flast* Court's analysis came earlier in the opinion. In considering the jurisprudential foundation of Article III standing, the *Flast* Court opined that "the question of standing is related *only* to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U.S. at 101 (emphasis added). Referencing this precise passage nearly thirty years later, this Court expressly *rejected* the *Flast* approach. "This would perhaps have seemed like good law at the time of *Flast*, but *our later opinions have made it explicitly clear that Flast erred* in assuming that the assurance of 'serious and adversarial treatment' was the only value protected by standing." *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (emphasis added). "The requirements of Art. III are not satisfied merely because a party requests a court of the United States

to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Forge*, 454 U.S. at 471.

Thus, this Court has already expressly jettisoned the cornerstone of the *Flast* structure.

b. The Particular Confusion *Flast* Perceived over Constitutional Requirements No Longer Exists.

The *Flast* Court, while acknowledging the *Frothingham* rule against taxpayer standing, professed "confusion" over the difference between the strict requirements of Article III and merely prudential "policy considerations" governing limitations on standing. *Flast*, 392 U.S. at 92-94. *Cf. also id.* at 95-97 (finding uncertainty in meaning and scope of doctrine of justiciability in general); *id.* at 98-99 (describing standing doctrine as complex and vague). The relevant "confusion" no longer exists. After frankly acknowledging that the distinction between constitutional and prudential elements of standing "has not always been clear," *Valley Forge*, 454 U.S. at 471 (citing *Flast*), this Court noted that a subsequent "line of decisions, however, has resolved that ambiguity," at least regarding the "irreducible minimum" requirements of Article III. *Valley Forge*, 454 U.S. at 472.

Thus, it is now well settled that to bring a claim in federal court, a plaintiff must satisfy the "irreducible

constitutional minimum" of standing, namely, by demonstrating the following three elements:

> (1) an "injury in fact" that is "concrete" and "actual or imminent";
>
> (2) a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant"; and,
>
> (3) "redressability -- a substantial likelihood that the requested relief will remedy the alleged injury in fact."

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (internal quotation marks, editing marks, and citations omitted); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998).[6]

It is now abundantly clear that the want of standing for a federal taxpayer claim flows not from

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[6] This Court made clear in *Steel Company* that standing cannot rest upon the fact that a plaintiff "will be gratified by seeing [a defendant] punished for its infraction and that the punishment will deter the risk of future harm." *Id.* at 106-07. To accept such reasoning "would make the redressibility requirement vanish." *Id.* at 107. With respect to the plaintiff's gratification, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* As for deterrence, every adverse ruling will deter a defendant. A "generalized interest in deterrence . . . is insufficient for purposes of Article III." *Id.* at 108-09.

The *Steel Company* Court also held that the mere prospect of an award of costs and attorney fees cannot generate standing. *Id.* at 107-08.

any mere policy choices, but rather from a fundamental constitutional inadequacy. A federal taxpayer claim lacks the necessary elements of a concrete personal injury (as opposed to the same undifferentiated "injury" all citizens and taxpayers suffer from illegal government action[7]), traceability (federal tax funds being emptied into a general treasury from which appropriations are drawn[8]), and redressability (since a successful suit would yield neither a tax refund nor any real likelihood of a reduction in the taxpayer's tax bills[9]). "Article III

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[7] We have consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992). *See generally id.* at 574-76 (discussing cases). *Accord Cuno*, 547 U.S. at 344 ("standing has been rejected in [taxpayer] cases because the alleged injury is not concrete and particularized . . . but instead a grievance the taxpayer suffers in some indefinite way in common with people generally . . . . In addition, the injury is not actual or imminent, but instead conjectural or hypothetical") (internal quotation marks and citations omitted); *Hein*, 551 U.S. at 600 (plurality) ("the interests of the taxpayer are, in essence, the interests of the public at large").

[8] *Hein*, 551 U.S. at 614 (plurality).

[9] "It is pure speculation whether the lawsuit would result in any actual relief for respondents." *Cuno*, 547 U.S. at 344 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (plurality (continued...)

requires a demonstration of redressable injury that is *not* satisfied by a claim that tax moneys have been spent unlawfully." *Valley Forge*, 454 U.S. at 484 n.20 (emphasis added). *Accord Richardson*, *Schlesinger*, *Cano*.

c. *Flast* Improperly Disregarded Separation of Powers Concerns.

The *Flast* Court opined that the question of standing to sue "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated." 392 U.S. at 100-01.

That proposition is simply no longer tenable. As this Court has repeatedly held, the standing requirements of Article III play a vital role in maintaining the proper separation of powers between the Congress, the Executive, and the Judiciary. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992); *Lewis v. Casey*, 518 U.S. at 349; *Cano*, 547 U.S. at 341. "The constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers." *Steel Co.*, 523 U.S. at 101. Indeed, this Court has already expressly declared that "*Flast* erred" when it "failed to recognize that this doctrine has a separation-of-powers component . . . ."

(continued)
opinion of Kennedy, J.))

Lewis, 518 U.S. at 353 n.3. *Accord Hein*, 551 U.S. at 611 (plurality) (*Flast* "gave too little weight to [separation-of-powers] concerns").

d. *Flast's* Reliance on Hypothetical Worst Cases Does Not Support Standing.

The *Flast* Court expressed concern that if taxpayers did not *ipso facto* have standing to bring Establishment Clause claims, then taxpayers could not sue "even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects." 392 U.S. at 98 n.17. But this Court has since held that such a concern is legally irrelevant.

The hypothetical downside of a lack of taxpayer standing is by no means unique to Establishment Clause claims. Little imagination is needed to conjure up nightmarish hypothetical violations of the Statement and Account Clause and the Incompatibility Clause, for example, yet there is no taxpayer standing to challenge such violations, *see Richardson*, *Schlesinger*. One could likewise theorize infringements of a host of other constitutional provisions, such as the Title of Nobility Clause (U.S. Const. art. I, § 9, cl. 8), for which a taxpayer lawsuit might be the only realistic means of bringing the violations to court. But "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S. at 227. *Accord Valley Forge*, 454 U.S. at 489 (quoting same

language in denying standing to bring Establishment Clause claim). "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S. at 179.

"In the unlikely event" that a worst-case scenario materialized, "Congress could quickly step in." *Hein*, 551 U.S. at 614 (plurality). Moreover, worst case scenarios have a way of generating political consequences. As this Court observed in *Richardson*, "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. 418 U.S. at 179.

Furthermore, to disallow taxpayer standing is not to disallow other routes to standing. STOs, for example, could sue if the state were improperly to deny tax credit eligibility to certain STOs. And if the state were improperly to obstruct the formation of STOs desired by certain parents, either those parents, *as parents*, or the would-be STOs, would likely have standing.

e. *Flast* Erred by Conferring Uniquely Privileged Status on Establishment Clause Claims.

The *Flast* Court perceived significance in its view that "one of the specific evils" feared by the drafters of the Establishment Clause "was that the taxing and

spending power would be used to favor one religion over another." 392 U.S. at 103. This observation, however, goes to the scope of the Establishment Clause *on the merits*, not to the availability of taxpayer standing. As the Court has since observed, "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. And as *Valley Forge* held, litigants' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487 (footnote omitted).

More recently, in *Cuno*, this Court distinguished *Flast* and referred to its "narrow application in our precedent," 547 U.S. at 348. This Court accurately described *Flast* as having "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extraction and spending' of 'tax money' in aid of religion . . . ." 547 U.S. at 348. *See Flast*, 392 U.S. at 106. While *Flast*'s description of the relevant injury served to distinguish *Flast* from *Cuno* (and from the present case), it underscores *Flast*'s incompatibility with this Court's standing doctrine. For while *Flast*'s redefinition of the "injury" may suffice to clear the *redressability* hurdle ("an injunction against the spending would of course redress *that* injury," *Cuno*, 547 U.S. at 348 (emphasis in original)), the injury as defined in *Flast* clearly fails the Article III requirements for a cognizable *injury*. Such an injury is insufficient because that injury is

"shared with all members of the public." *Richardson*, 418 U.S. at 178 (internal quotation marks and citation omitted). *Accord Lujan*, 504 U.S. at 573-74 ("generally available grievance about government" is insufficient for standing); *Valley Forge*, 454 U.S. at 483 ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning").

* * *

Respondents' assertion of standing depends not just on *Flast*, but on an *expansion* of *Flast*. Yet *Flast* has been problematic from the start. In the years since *Flast*, this Court has knocked out every single rationale underpinning that decision. *Flast* causes unfairness by privileging only separationist taxpayer lawsuits. *Flast* creates inconsistency with the rest of Article III case law. On top of all that, *Flast* licenses a limited *violation* of Article III and a *violation* of the separation of powers under the Constitution. (The injury, traceability, and redressibility elements of standing are not mere prudential rules but constitutional requirements.) *Flast* is thus pre-eminently an example of a precedent that does *not* warrant expansion.

Assuming this Court does not overrule *Flast* altogether, *see Hein*, 551 U.S. at 614 (plurality) ("the present case does not require us to reconsider that

precedent"), this Court should at the very least reject respondents' invitation to expand *Flast*.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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August 6, 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 6 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

In the Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR SCHOOL CHOICE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The American Center for School Choice ("ACSC") is a non-profit corporate entity, founded in 2008 and dedicated to the proposition that meaningful parental choice in education is a moral and civic imperative and serves well the good of children, the good of families, and the good of the political community.

The mission of ACSC is to support and defend policies that make it possible for poor and working-class parents to exercise their right – a right that well-off families already enjoy and exercise – to choose the schools that they believe will best form and educate their children. ACSC believes that the education of the child is a fundamental responsibility of the family -- one that the political community should support, but not usurp – and that enabling parents to choose the school that will best help them to fulfill this responsibility will strengthen our families, our schools, and our communities.

ACSC is not a partisan pressure-group. Instead, it addresses all citizens who are concerned about freedom, justice, opportunity, and the common good,

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[1] *Amicus curiae* files this brief with the consent of the parties, and the parties' letters of consent have been filed with the Clerk of this Court. *See* S. Ct. Rule 37.3(a). This brief was authored entirely by *amicus* and its counsel, who are named on the front cover of this brief, and was not authored in any part by any of the parties or by any party's counsel. No person or entity, other than *amicus*, its supporters, and its counsel, has made any monetary contribution to the preparation or submission of this brief. *See* S. Ct. Rule 37.6.

proposing that parental choice in education is an exercise of freedom and a matter of justice that contributes to the common good. ACSC provides expertise across a broad range of crucial areas – education and persuasion, research and information, program design and implementation, litigation and legislation – bringing conceptual clarity, intellectual rigor, practical know-how, and political savvy to the task of formulating a wise, just, and effective set of educational policies that will serve the American public – in a manner entirely consistent with the First Amendment to our Constitution – by supporting American families.

STATEMENT OF THE CASE

The history and details of this case are set out fully elsewhere, including in the brief of Petitioner Arizona Christian School Tuition Organization. The United States Court of Appeals for the Ninth Circuit ruled below that an Arizona program which allows taxpayers to donate their own money to a "school tuition organization" of their choice, and to credit the amount donated against their state-income-tax obligation, "overall" and "in practice" violates the Establishment Clause of the First Amendment to the Constitution because it supposedly does not make scholarships available to parents on a religion-neutral basis and therefore "carries with it the *imprimatur* of government endorsement" of religion. *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002, 1005 (9th Cir. 2009) (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002)), *reh'g denied*, 586 F.3d 649 (9th Cir. 2009).

Judge O'Scannlain, joined by seven of his colleagues, dissented powerfully from the denial of rehearing en banc, and demonstrated that the decision of the court below "cannot be squared with [this Court's] mandate in *Zelman*" and "casts a pall over comparable tax-credit schemes in states across the nation[.]" 586 F.3d at 659 (O'Scannlain, J., dissenting). As Judge O'Scannlain correctly observed, the Arizona program at issue does not itself "direct any aid to any religious school. Nor does the government encourage, promote, or otherwise incentivize private actors to direct aid to religious schools." *Id.* at 658-59. "In short," he concluded, "the panel's conclusion invalidates an increasingly popular method for providing school choice, jeopardizing the educational opportunities of hundreds of thousands of children nationwide." *Id.* at 659. On May 24, 2010, this Court granted certiorari.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

We agree entirely with Petitioners that the panel below misapplied this Court's relevant doctrines and decisions – including *Zelman* – and that the ruling under review is neither required by, nor consistent with, the First Amendment to our Constitution. Arizona's tax-credit program does not impermissibly "establish" or "endorse" religion. Instead, it is an entirely permissible (and promising) policy experiment that empowers taxpayers and parents to provide enhanced educational opportunities to children through a religion-neutral tax-credit mechanism. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)("It is one of the happy incidents of the federal system that a single

courageous state may, if its citizens choose, serve as a laboratory[.]"). For the reasons stated and elaborated in Judge O'Scannlain's dissent from denial of rehearing, the decision below should be reversed, and the Establishment Clause challenge to the Arizona program rejected.

This case implicates – and this Court should vindicate -- two foundational and animating principles of our Constitution and tradition: First, as was emphasized long ago in *Pierce v. Society of Sisters*, parents enjoy the "liberty . . . to direct the upbringing and education" of their children. 268 U.S. 510, 534 (1925). After all, "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. Arizona's tax-credit program helps to make this promised right a meaningful reality for thousands of parents.

Second, and relatedly, this Court reminded the country in its landmark decision in *Brown v. Board of Education* that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education[.]" 347 U.S. 483, 493 (1954). *See also Zelman*, 536 U.S. at 680 (Thomas, J., concurring) ("[W]ithout education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment."). Policy initiatives like Arizona's bring this opportunity closer to thousands of children for whom it would otherwise, unfortunately, be out of reach.

This case presents a discrete and straightforward question of constitutional law, namely, whether

Arizona's tax-credit program violates the Establishment Clause. It does not. It should be appreciated, though, that choice-in-education is not and should not be regarded only as a free-market fad or an efficient means of promoting economic growth. Instead, as John Coons explained nearly 20 years ago:

> [T]he case for choice in education goes much deeper than market efficiency . . . . Shifting educational authority from government to parents is a policy that rests upon basic beliefs about the dignity of the person, the rights of children, and the sanctity of the family; it is a shift that also promises a harvest of social trust as the experience of responsibility is extended to all . . . .
>
> Choice . . . needs to be loved for its own sake, or at least for a reason more noble than its capacity to make life better for the producers. In fact, there are larger reasons for believing in choice–reasons equal in dignity to those that underlie our great constitutional freedoms.

John E. Coons, *School Choice as Simple Justice*, FIRST THINGS, Apr. 1992, at 15. *See also* Nicole Stelle Garnett & Richard W. Garnett, *School Choice, The First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 363 (2000) ("School choice is not . . . about profit, efficiency, or competition. It is about justice.").

The panel's misreading and re-casting of this Court's authoritative and correct decision in *Zelman* threatens not only to confuse and misshape Establishment Clause doctrine but also to undermine creative reform efforts by federal, state, and local

governments and thereby to deprive children in poor and working-class families of hope and opportunity and their parents of dignity. Policy experiments like the Arizona program under review are welcome steps toward a prudent restoration of the right and responsibility of low-income parents to exercise the fundamental social function enjoyed by more fortunate parents. The legitimate interest of the State in securing that right for all citizens is part of the message of *Zelman*. The decision below runs contrary to that message, and should be reversed.

ARGUMENT

Arizona's Tax-Credit Program Helps to Make Meaningful the Fundamental Right of Parents to Direct the Education and Formation of Their Children and to Secure Better Educational Opportunities for Thousands of Children

The family is the building block of civil society and a seed-bed of good citizenship. Our constitutional tradition has therefore respected its autonomy and integrity. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with [this Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . And it is in recognition of this that . . . decisions have respected the private realm of family life which the state cannot enter."). A long line of this Court's decisions confirm that parents' rights sit at the very heart of the "liberty" protected by the Fourteenth Amendment. *See generally Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest

at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.") As this Court observed in *Parham v. J.R.*, 442 U.S. 584, 602 (1979):

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's important decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.

These rights are not recent innovations, but instead reflect protections deeply rooted in our history and tradition. As the Court stated in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972):

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of children. This primary role of the parents in the upbringing of

> their children is now established beyond debate as an enduring American tradition.

Parents' rights and family autonomy do not depend on or derive from positive law, but rather are "intrinsic human rights, as they have been understood in this Nation's history and tradition." *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977). These statements and principles are not dusty anachronisms, but are instead among the more inspiring and truly liberating statements in the *United States Reports*. That parents play the primary role in childrearing and educating children is true not just as a matter of Anglo-American tradition and constitutional law. There is universal recognition of the fact that "parents seem naturally inclined to love and care for their children." Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 953 (1996); *see also Parham*, 442 U.S. at 602 (The concept of the "family as a unit with broad parental authority over minor children" is rooted in the recognition that the "natural bonds of affection lead parents to act in the best interests of their children").

Accordingly, decisions such as *Pierce* and the principle of parental control in education do not reveal archaic and patriarchal prejudices, but instead reflect the common-sense, truly child-centered belief that, in Professor Gilles's words, "parents are more likely to pursue the child's best interest as they define it than is the State to pursue the child's best interest as the state defines it." Gilles, *On Educating Children, supra,* at 940. This Court's vindication of the fundamental right described in *Pierce* "promises children that decisions about their best interests will

be made by those who, generally speaking, are most likely to work conscientiously, motivated by love and moral obligation, to advance their best interests." Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 133-34 (2000). And, programs like the Arizona tax-credit experiment help to make good on that promise, one that for too many "remains a hollow promise, conditioned to a large degree by the economic position of parents." JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 143 (1999). Programs like Arizona's are not ideological impositions on families; rather, they reflect and recognize the way that families usually do, desire to, and should work and function.

It is crucial to recall that, for every individual child, one or more adults will select a preferred set of skills and values and will attempt, through some accepted form of schooling, to convince that child of their truth and importance. In other words, adult authority over a child's experience shrinks and departs over time, and it may be exercised well or poorly, but it is an inescapable reality during the many years that education is required by law. Whatever one's political or philosophical orientation, the question must be answered: *Who decides?* Who – which adult – will select the school experience for this child? And, again, in our traditions, we have rejected Plato's answer to this question, and affirmed repeatedly the rights and responsibilities of parents in the formation and education of children.

We have done this not because children are "property" (they are certainly not) or without moral

and legal rights. Nor have we done this because parents are always good and caring decisionmakers. We have done so, instead, for the good of children and the good of society, recognizing that a fit, custodial parent is likely to care about his or her child as one of a kind, to know that child better than others, and to feel the weight of moral responsibility and accountability for that child's welfare and flourishing. That programs like the Arizona tax-credit initiative under review make it possible, or at least easier, for parents to carry out this responsibility – to escape the crushing and demoralizing sense of helplessness that can accompany poverty – is no small point in its favor.

Parents today are likely to hear a great deal about their responsibilities. We tell them, for example, that if they do not like what's on television, then it is their responsibility to turn it off. But, one cannot fairly be given responsibility without the authority to make decisions and the capacity to act on them. In the context of education, it is too common to treat parents as, in effect, "nobodies"; many parents, not surprisingly, receive this message clearly and act accordingly. Given the schooling regime that so many of our fellow citizens experience, a natural response is passivity and despair. If we truly embrace the values to which decisions like *Pierce* and *Brown* commit us, then we ought to take steps – as Arizona has – to make sure that American parents who are not so rich have real authority over who will have access to their children's minds for the prime hours of their formative years.

CONCLUSION

Parental choice in education, which the Arizona tax-credit program helps to promote, is constitutional, sensible, and just. What's more, it is essential to achieving equality of opportunity for American children, rich or poor. School choice treats the poor as citizens of equal dignity; it promotes the independence upon which constitutional government depends; and it empowers parents to transmit their values to their children. Because the decision below is inconsistent both with this Court's controlling Establishment Clause precedents and with fundamental values that have long animated our traditions, it should be reversed.

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AMICUS CURIAE BRIEF

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FILED
SEP 22 2010
OFFICE OF THE CLERK

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BRIEF *AMICI CURIAE* OF THE AMERICAN HUMANIST ASSOCIATION, AMERICAN ETHICAL UNION, ATHEIST ALLIANCE INTERNATIONAL, CENTER FOR INQUIRY, COUNCIL FOR SECULAR HUMANISM, FREEDOM FROM RELIGION FOUNDATION, INSTITUTE FOR HUMANIST STUDIES, SECULAR COALITION FOR AMERICA, SECULAR STUDENT ALLIANCE, SOCIETY FOR HUMANISTIC JUDAISM AND UNITARIAN UNIVERSALIST ASSOCIATION, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

1. Whether the First Amendment's Establishment Clause is violated by an Arizona statute under which school tuition organizations—state instrumentalities that are funded with tax revenues and heavily regulated by the state Department of Revenue—discriminate on the basis of religion in awarding scholarships.

2. Whether Respondents have standing as taxpayers to assert an Establishment Clause challenge to the Arizona statute.

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INTERESTS OF *AMICI CURIAE* [1]

This *amici curiae* brief in support of the Respondents is being filed on behalf of the American Humanist Association, American Ethical Union, Atheist Alliance International, Center for Inquiry, Council for Secular Humanism, Freedom From Religion Foundation, Institute for Humanist Studies, Secular Coalition for America, Secular Student Alliance, Society for Humanistic Judaism and Unitarian Universalist Association, comprising a diverse array of secular and religious organizations that advocate on behalf of religious liberty and equal opportunity, and offer a unique viewpoint concerning the history of religious freedom and civil rights in the United States of America.

Amici assert that this case addresses core humanist and atheist concerns about the public's responsibility to provide a secular education for our children. The Arizona statute at issue in this case—Ariz. Rev. Stat. §43-1089—subverts the tax system by providing tax credits for the funding of religious education for children. Taxpayers are given a dollar-for-dollar tax credit for contributions to school tuition organizations ("STOs"). In a hypothetical

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[1] *Amici* file this brief with the consent of all parties. Consents of the parties are on file with the Clerk of the Court. No counsel for any party in this case authored in whole or in part this brief. No person or entity, other than *amici*, their members or their counsel made a monetary contribution for the preparation or submission of this brief. The amici have no parent corporations, and no publicly held companies own 10% or more of their stock.

world, each STO might be required to award scholarships based on financial need or other non-religious criteria; such an STO would discriminate neither against nor in favor of religious applicants in the awarding of scholarships. In actual practice, however, there are Catholic STOs that provide scholarships only for education at Catholic schools, Jewish STOs that provide scholarships only for education at Jewish schools, and so on. Further, the STOs, when considered collectively, provide much more money for religious education than for secular education. The choice of Arizona parents to provide a secular private education for their children is thus severely limited by the manner in which the Arizona tax credit program operates. It is far easier to obtain a scholarship for religious education.

Amici wish to bolster the principle of religious neutrality—that government may not prefer one religion over another, or religion over nonreligion—by informing the Court that *amici* support the Ninth Circuit's decision and that a reversal of the decision would have the constitutionally impermissible effect of advancing religion.

SUMMARY OF ARGUMENT

First, the Respondents have made a *prima facie* case that the Arizona statute at issue, as applied by the Department of Revenue, violates the Establishment Clause, inasmuch as the primary purpose and effect of Ariz. Rev. Stat. §43-1089 is state funding of private religious instruction.

Second, regarding the issue of standing, enforcement of fundamental rights guaranteed by the constitutions of the United States and Arizona requires access to the courts. Petitioners would have the Court deny citizens of Arizona their fundamental right of religious liberty by closing the Doors of Justice—access to the courts. A failure to accord Respondents standing would, in effect, erect an impenetrable barrier to judicial scrutiny of legislative action.

State taxpayers have had standing to challenge violations of the Establishment Clause for the past 63 years—since the Court first applied the Establishment Clause to the states. Respondents' status as state taxpayers and the facts of this case are consistent with the requirements for taxpayer standing set forth by the Court in *Flast v. Cohen*, 392 U.S. 83 (1968), *Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429 (1952), *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007) and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

Third, the function of the federal judiciary is to resolve cases and controversies arising under the Constitution. Raising the bar of standing in order to insulate government officials and programs from accountability or redress—as the Petitioners implore the Court to do—is entirely inconsistent with the Court's function.

This case presents the Court with the opportunity to preserve our First Liberty—freedom

from government-sponsored religion—by affirming the decision of the court below.

ARGUMENT

I. ARIZONA'S "SCHOLARSHIP" PROGRAM VIOLATES THE CONSTITUTIONS OF THE UNITED STATES AND ARIZONA.

In Arizona, the Christian majority has used state government to advance their religion notwithstanding the First Amendment's prohibition against laws "respecting an establishment of religion."[2] Specifically, the primary purpose of enacting Ariz. Rev. Stat. §43-1089 ("Section 1089") was to fund private religious education and the primary effect has been that 90% of the scholarships awarded by STOs are awarded on the basis of religion.

By incentivizing the public to direct aid towards STOs without a provision forbidding discrimination on the basis of religion, Section 1089 aids majoritarian religions and "provide[s] the Church with a legal weapon that no atheist or agnostic can obtain." *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring). In effect, the program allows taxpayers to "vote" with their pocketbooks, which ensures that dominant religions will be preferred and minority religions and

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[2] U.S. Const., amend. 1: "Congress shall make no law respecting an establishment of religion."

nonreligion marginalized. "[T]he majoritarian process . . . guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." *Santa Fe Indep. Sch. Dist. v. Doe*, 530, U.S. 290, 308 (2000). Arizona allows the majority (Christians)[3] to use this instrument of the government to promote their version of religion, which misconceives what it is that the Constitution protects.

The Court has held that the First Amendment has "never meant that a majority could use the machinery of the State to practice its beliefs." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 226 (1963). Rather, the framers intended the Bill of Rights to place "certain subjects . . . beyond the reach of majorities," where fundamental rights "may not be submitted to vote" and "depend on the outcome of no elections." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). Under this statute, STOs promoting secular education or minority religions, including Buddhism, Taoism, Ethical Culture and others, *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11 (1961), like Wicca, are unlikely to be formed because of the administrative costs in establishing and operating an STO and diseconomies of scale.

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[3] Although any group may form an STO, Arizona drafted its statute to enable "85 percent or more of the state financed scholarship money" to be "available only to students whose parents are willing to send them to sectarian institutions." *Winn v. Arizona Christian School Tuition Organization*, 586 F.3d 649, 650 (2009) ("*Winn II*").

A. School Tuition Organizations are instrumentalities of the state.

The STOs are instrumentalities of the state or "state actors" and, as result, the religious discrimination that religious STOs engage in when awarding scholarships to applicants must be imputed to the state for purposes of the Establishment Clause. *See Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 378 (1995). ("We have held once, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and said many times, that actions of private entities can sometimes be regarded as governmental action for constitutional purposes.")

For several reasons it is evident that STOs are state instrumentalities or state actors. First, STOs are funded with tax revenues—funds that would have otherwise been paid to the Arizona Department of Revenue had the tax revenues not been diverted to the STOs.

Second, STOs are heavily regulated by the Department of Revenue and the regulation is far more extensive than the regulation applied to private charities. STOs must meet the detailed requirements of new Chapter 16 of Title 43 of the Arizona Revised Statutes in order to be "certified" by the Department, and the Department has authority to revoke the certification if the statutory requirements are not met. One such requirement pertains to the use of an STO's revenues. Under § 43-1603(B)(1), an STO "[m]ust allocate at least ninety percent of its annual revenue for educational

scholarships or tuition grants." Presumably, the other 10 percent of the annual revenue must be spent on salaries and other administrative expenses. An STO does not have substantial discretion as to the use of its funds, but an ordinary charity would have such discretion. For example, an STO cannot satisfy the 90% requirement by purchasing computers and donating the computers to private schools even though that would serve an educational purpose. Also, unlike a private scholarship fund or other private charity, an STO must, under §43-1605, hire an independent certified public accountant to conduct an annual financial audit or review to evaluate the STO's compliance with the fiscal requirements of the statute. The report prepared by the CPA must be timely submitted to the Department. The state does not impose such detailed regulations on private scholarship funds regardless of their size. It makes sense that the statute imposes such detailed and burdensome requirements on STOs. After all, the operations of an STO are carried out with tax revenues, not private funds.

Third, the state's sovereign power to use tax revenues for education is delegated under the statute to the executives and officers of STOs and the education of children is "an activity that traditionally has been the exclusive, or near exclusive, function of the State." *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151 (2nd Cir. 2004).

B. Constitutions of the United States and Arizona prohibit government funding of religious instruction.

In the present case, both the purpose and effect of Section 1089 is to promote religion. This is expressly prohibited by the Establishment Clause[4] of the United States Constitution and Religious Purpose Clause[5] of the Arizona Constitution.

The Court said emphatically in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947):

> The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any ***religious activities or institutions***, whatever they may be called, or whatever form they may adopt to teach or practice religion. (Emphasis added.)

To circumvent the prohibition in *Everson* against the use of tax revenues to support religious institutions, the Arizona legislature enacted Section 1089. Under Section 1089, an *illusion* is created that STOs are supported with private charitable

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[4] The Establishment Clause is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).

[5] Ariz. CONST., art. 2, §12: "No public money or property shall be appropriated for or applied to any *religious* worship, exercise, or *instruction*, or to the support of any religious establishment." (Emphasis added.)

contributions. It is true that payments to STOs are made using private checking accounts, but that does not mean the payments are charitable contributions. Given the dollar-for-dollar tax credit, payments to STOs must be considered *tax payments*—money paid to satisfy tax obligations that would otherwise have been paid to the Department of Revenue.

The Arizona legislature and the Christian majority in that state have manipulated the tax code to provide government funds—cleverly disguised as charitable contributions—for the support of private religious schools. Under this Court's decisions, *infra*, it makes no difference whether a state is using its tax authority, rather than its spending authority, to fund so-called scholarships and grants to religious schools when the purpose and effect of the legislation is to fund religious instruction.

C. The "purpose" of Section 1089 is to fund private religious instruction, thereby violating the Establishment Clause.

A statute violates the Establishment Clause, *inter alia*, when it lacks "a secular legislative purpose," or when "its principal or primary effect" either "advances" or "inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1968).

The Ninth Circuit left open the issue of whether Section 1089 failed *Lemon's* purpose prong concluding that "plaintiffs' allegations, if accepted as true, leave open the possibility that plaintiffs could reveal the legislature's stated purpose in enacting Section 1089 to be a pretense." *Winn v. Arizona*

Christian School Tuition Organization, 562 F. 3d 1002, 1012 (2009) (*"Winn I"*).

Amici are of the view that there is more than sufficient evidence in the record for the Court to find that the legislature's purpose for enacting Section 1089 indeed fails the purpose prong of *Lemon*.

McCreary County, Ky. v. ACLU of Ky. 545 U.S. 844, 864 (2005) informs us that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." Though deference is to be accorded the purpose articulated by the legislative branch, "[w]hen a governmental entity professes a secular purpose for an arguably religious policy . . . it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe*, 530 U.S. at 308 (quoting *Wallace v. Jaffree*, 472 U. S. 38, 75 (1985) (O'Connor, J., concurring in judgment).

Arizona's stated purpose is a sham. The deference that the Court normally accords a legislative branch is not justified here. The record provides ample "evidence that the State deliberately skewed incentives toward religious schools" in violation of the Establishment Clause. *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002).

First, Arizona deliberately excluded discrimination based on religion in Section 1089 to enable STOs and schools to select applicants based on religion rather than on secular criteria (as was the case in *Zelman*). Any STO is eligible for funding so long as the schools supported by the STO do not

"discriminate on the basis of race, color, handicap, familial status or national origin." § 1089(H)(2). Consistent with the rule of statutory construction that the explicit mention of one thing is the exclusion of another, Arizona drafted its statute to allow taxpayers to contribute to STOs that discriminate on the basis of religion to favor religious applicants.

In *Zelman*, participating private schools were only eligible for funding if they agreed not to "discriminate on the basis of race, religion, or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.'" Ohio Rev. Code 3313.976(A)(6); *Zelman v. Simmons-Harris*, 536 U.S. at 645. Arizona could have drafted its statute to prohibit STOs from funding schools that discriminate on the basis of religion, but that would have defeated the very purpose of the statute.

Second, under the Section 1089 program now in effect, scholarships need not be awarded on the basis of financial need, academic achievement or other non-religious criteria. This strongly suggests a legislative intent to fund religious instruction. And this is quite different from *Zelman*. Under the Ohio school voucher program, children with the greatest financial need are given priority.[6] Although § 43-

[6] See Ohio Rev. Code 3313.977(A)(1)(c), for example, in which each registered private school is required to give a priority in kindergarten through third grade to "Children from low-income families . . . until the number of such students in each grade equals the number that constituted twenty per cent of the total

1603(D)(2) of Arizona's revised scholarship program (which takes effect on January 1, 2011) suggests that STOs "[s]hall consider the financial need of applicants," *amici* believe that the revision is insignificant as this new financial need clause is largely precatory. The revised statute requires that STOs "consider" financial need, however, the statute does not specify how much weight financial need is to be given in the awarding of scholarships.[7]

Third, Section 1089 provides a 100% tax credit to donors contributing to STOs with the result that Arizona funds the entire STO program. Arizona skewed incentives towards religion by offering 100% tax credits[8] instead of a tax credit typically in the range of 10-30% or tax deductions. This distinction is significant because the former creates an extraordinary incentive for the taxpayer to contribute to an STO because the taxpayer literally pays nothing—the state of Arizona picks up the entire expense of the STO program. A tax credit allows more people to donate to STOs as it makes the donation essentially free to the taxpayer. *See Hibbs v. Winn*, 542 U.S. 88, 95 (2004). Arizona's statute is an "ingenious" plan "for channeling state

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number of students enrolled in the school during the preceding year in such grade."

[7] For example, an STO might "consider" and note that Applicant A is financially needy while Applicant B is not needy, but nonetheless prefer Applicant B because he is far more devout in his religious practices.

[8] A taxpayer may annually take a 100% credit against his or her state income tax liability up to $500; married taxpayers filing jointly may take a credit up to $1,000. Ariz. Rev. Stat. §43-1089(A).

aid to sectarian schools." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973).

Indeed, the Court recognizes that "criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini v. Felton*, 521 U.S. 203, 231 (1997). In *Agostini* the Court held that financial incentives are not present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* Because Arizona does not mandate that beneficiaries of Section 1089 be selected in a nondiscriminatory fashion, the statute has the effect of advancing religion and violates the principle of neutrality. "In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment." *Schempp*, 374 U.S. at 226.

Fourth, Arizona has failed to establish adequate criteria—intelligible principles—to guide STOs and taxpayers to achieve the putative secular purpose of providing "equal access to a wide range of schooling options for students of every income level." *Winn I*, 562 F.3d at 1011. Judge O'Scannlain incorrectly noted that, "by 'delegating' the choice to taxpayers, the government [b]roke the circuit." *Winn II*, 586 F.3d at 667. (O'Scannlain, J., dissenting). But Arizona did not "break the circuit" since it merely delegated its legislative duty to STOs. The

nondelegation doctrine maintains that "[a] legislative body cannot part with its powers by any proceeding so as not to be able to continue the exercise of them." *Town of East Hartford v. Hartford Bridge Co.*, 51 U.S. 511, 535 (1850). Legislatures may only delegate legislative authority if they provide adequate criteria—"intelligible principles"—to guide the exercise of discretion in pursuance of that law. *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472 (2001).

Fifth, Arizona's tax credit program does not provide parents with a true private choice because the availability of vouchers rests in the hands of taxpayers who "direct funds to religious organizations." *Winn II*, 586 F.3d at 650. The crux of *Zelman* rested "not on whether few or many recipients chose to expend government aid at a religious school, but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing." *Zelman* 536 U.S. at 651. The persons empowered under Section 1089 are not the recipients of the aid but rather the taxpayers who are providing the aid. Judge O'Scannlain's assertion that the program "is no Hobson's choice," since Arizona provides a "wide variety of secular alternatives," is misleading. *Winn II*, 586 F.3d at 666 (O'Scannlain, J., dissenting). He presumed that the "host of options available to Arizona parents" are equivalent to private school education. The "other options" listed in the dissent are far from adequate substitutes. First, tax credits that "are available for donations to public schools for 'extracurricular activities or character education,'" *id.*, are not alternatives since they merely go towards

ancillary school programs. Second, "homeschooling," *id.*, may not even be an option for many single parents or low-income families who cannot afford the time to teach or the money to pay for an at-home teacher. Finally, the "extensive system of charter schools," *id.*, is not an alternative to private school education since charter schools are part of the public school system and barred from receiving STO vouchers effective January 1, 2011.

Rather, the true purpose of Section 1089 is to fund private religious education at taxpayer expense and thereby relieve parents of the financial burden of sending their children to private religious schools. This is an impermissible religious purpose under the Establishment Clause and Arizona's Religious Purpose Clause.

D. The "effect" of Section 1089 is to fund private religious instruction, thereby violating the Establishment Clause.

Section 1089 unquestionably fails the second prong of the *Lemon* test as its principal and primary effect advance religion. It is not coincidental that 93% of the $54 million collected by STOs in 2008 went to religious schools, and at least 91.5% of the $52 million collected in 2009.[9] Arizona intentionally omitted a religious-nondiscrimination clause, thereby intending the recipients of the vouchers to

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[9] Review of 2008 and 2009 scholarships under Section 1089 conducted by *The Arizona Republic*. *See* "U.S. Supreme Court to weigh Arizona's tax credit law", May 25, 2010, available at http://www.azcentral.com/arizonarepublic/news/articles/2010/05/25/20100525arizona-tax-credit-law.html.

be overwhelmingly religious institutions and for nonsectarian schools to be incidental beneficiaries.

The Establishment Clause does not allow a state to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in judgment); *Santa Fe* at 307 n.21 (2000). The effect of Arizona's statute is not "neutral in all respects toward religion," *Zelman*, 536 U.S. at 653, because the statute is constructed in such a way that could enable all STOs to limit scholarships to religious schools only.[10] To form an STO, a nonprofit organization must offer scholarships or tuition grants to students "without limiting availability to only students of one school." Section 1089(G)(3). Because this language allows STOs to limit scholarship funds to religious schools only, Judge

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[10] For example, the Catholic Tuition Support Organization (CTSO), which supports 25 Catholic schools and receives funding under Section 1089, sets forth the following requirement: "No person shall be admitted as a student to any Catholic school unless that person and the parents/guardian subscribe to the school's philosophy and agree to abide by the educational policies and regulations of the school and the Diocese." (D.H.B. 2110 (A)). The Diocesan Handbook expressly states, "Preference shall be given to Catholic students." *Diocese of Tucson Department of Catholic Schools*, Handbook of School Policies and Procedures, §2110 "Admissions" (2004). (Available at http://www.diocesetucson.org/Handbook%20of%20School%20Policies%20and%20Procedures.pdf.) Further, "Catholic and non-Catholic students must agree to attend religious classes and the religious activities conducted in the school." *Id.* at §2110(B).

O'Scannlain's argument that the statute could just as easily have "resulted in a total dearth of funding for religious organizations," and that the "feast or famine is utterly out of the state's hands," is incorrect. *Winn II* 586 F.3d at 662. (O'Scannlain, J., dissenting). Since Arizona could have prevented STOs from limiting tuition grants to religious schools only, the feast of funding for religious organizations is not out of the state's hands.

When the state is lending direct support to a religious activity, even a secular purpose and facial neutrality (if such were the case) may not be enough to guarantee its constitutionality. "The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike." *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976). In *Roemer*, the Court upheld a statute providing public aid in the form of noncategorical grants because secular activities could be separated out from sectarian ones and thus, the funded institutions were not so "pervasively sectarian." The Court based its ruling, *inter alia*, on the fact that "the student admission criteria did not depend on the students' religion." *Id.* at 755-756. Unlike *Roemer*, many of Arizona's private religious schools supported by STOs are pervasively sectarian.

In *Sloan v. Lemon*, 413 U.S. 825, 831 (1973), the Court held that Pennsylvania's tuition reimbursement legislation for tuition to nonpublic schools, without regard to income level, had the impermissible effect of advancing religion and

violated the Establishment Clause. The Court noted, "Pennsylvania authorizes grants to all parents of children in nonpublic schools—regardless of income level." *Id.* at 831. Conversely, the school voucher program upheld in *Zelman* provided educational assistance to poor children in a demonstrably failing public school system. *Zelman*, 536 U.S. at 653. The only "preference stated anywhere in the program [was] a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools." *Id.* Unlike *Zelman* and like *Sloan*, Arizona does not provide scholarships to families based on the greatest financial need.

The Court has said that the antidiscrimination principle inherent in the Establishment Clause necessarily means that discrimination on the basis of religion cannot prevail. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 611 (1989); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Because Arizona provides public funding to sectarian schools that discriminate on the basis of religion, the statute is invalid. *See e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (the Court implied that "a classification . . . drawn upon inherently suspect distinctions such as race, religion, or alienage" is unconstitutional).

II. ARIZONA TAXPAYERS HAVE STANDING TO CHALLENGE TAX CREDITS FOR CONTRIBUTIONS TO SCHOOL TUITION ORGANIZATIONS.

A. Non-Establishment Clause cases are inapposite with respect to taxpayer standing in Establishment Clause cases.

When a lawsuit is based on constitutional provisions other than the Establishment Clause, the plaintiff will generally lack standing when bringing suit solely in his or her capacity as a taxpayer. For example, in *DaimlerChrysler*, the general rule against taxpayer standing[11] was applied because the lawsuit was based on the Commerce Clause, which is not considered similar to the Establishment Clause for purposes of taxpayer standing. The Establishment Clause is unique. Only the Establishment Clause is a "specific limitation" on the power of Congress to tax or spend for the general welfare. *Flast*, 392 U.S. at 104-105.

Given the unique nature of standing when a taxpayer alleges that violations of the Establishment Clause have occurred, no reliance can be placed on general principles of standing or on cases cited by Petitioners and their *amici* involving provisions of the Constitution other than the Establishment Clause. Such cases are inapposite and serve only to confuse the issues presented. These cases include *Valley Forge Christian College v. Americans United*

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[11] *See Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

for Separation of Church & State, 454 U.S. 464 (1982) (no taxpayer standing to sue under the Property Clause of Art. IV, § 3, cl. 2); *United States* v. *Richardson*, 418 U. S. 166 (1974) (no taxpayer standing to sue under of Accountability Clause of Art. I, § 9, cl. 7); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974) (no taxpayer standing to sue under the Incompatibility Clause of Art. I, § 6, cl. 2); and *DaimlerChrysler* (no taxpayer standing to sue under the Commerce Clause of Art. I, § 8, cl. 3).

B. Respondents have standing under *Flast* and *Doremus*.

1. State taxpayer standing under *Flast*.

The Court held in *Flast* that a taxpayer will meet the requirements of Article III standing "when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Flast*, 392 U.S. at 105-106. The *Flast* Court developed a two-pronged "nexus" test for taxpayer standing: (1) the plaintiffs must show a "logical link between [taxpayer] status and the type of legislative enactment attacked" and (2) the "taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 102.

Under Flast, a taxpayer has standing to sue under the Establishment Clause whenever government funds are expended in support of

religion pursuant to Congressional legislation. As Justice Stewart explained, "Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution." *Flast*, 392 U.S. at 114 (Stewart, J., concurring). This reasoning applies equally when it is not the federal government, but one of the states, which is appropriating government funds in an unconstitutional manner; see *infra* pp. 25-26.

If this Court were to overrule *Flast* or limit its logic to federal taxpayers only, fundamental principles of constitutional law favoring judicial review would thereby be frustrated.

Taxpayers have a "vested legal right" that their government not expend tax dollars in support of religion. *See McCreary County*, 545 U.S. at 860. Whenever tax dollars are spent in this manner, taxpayers should be able to seek the protections of the Establishment Clause by bringing a lawsuit in federal district court. Federal courts are not required to rule in favor of these taxpayers, but judicial review should be available and taxpayers given their day in court. Overruling *Flast* would be a serious mistake. It would be inconsistent with the basic principles of *Marbury v. Madison*, 5 U.S. 137 (1803), that favor judicial review when an allegation is made that legal rights are violated.

In *Flast*, the Court quoted James Madison's statement about the evils of forcing a taxpayer to contribute "three pence" for the support of religion.

Flast, 392 U.S. at 103. The Court's reference to a forced contribution of "three pence" is significant. Three pence is, and always was, a trivial and insignificant amount of money.[12] The reference underscores the salient point that the taxpayer plaintiff in *Flast* had standing even though the Establishment Clause violation alleged to exist neither increased the plaintiff's tax burdens nor otherwise caused any measurable pecuniary injury unique to the plaintiff. Further, the taxpayer plaintiff in *Flast* had standing even though no allegation was made that the plaintiff's tax burden would be reduced if the Court ordered the government to cease making expenditures that violated the Establishment Clause. The only requirement for standing under *Flast* is that a substantial sum be appropriated by the legislature in support of religion. It is this expenditure of the money in support of religion that creates standing, not the financial impact of the expenditure on any particular plaintiff.

The Court said in *Flast*: "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103. That evil is precisely the problem presented in the present case. Under the Arizona

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[12] "The million-dollar grants sustained today put Madison's miserable 'three pence' to shame." *Tilton v. Richardson*, 403 U.S. 672, 697 (1971) (Douglas, J., with Black and Marshall, JJ., concurring in part and dissenting in part.)

statute, tax dollars that would otherwise have been paid to the Department of Revenue to satisfy tax obligations are diverted overwhelmingly to religious STOs. These payments to the STOs are not charitable contributions, although they are often referred to as such. In the case of a true charitable contribution, the taxpayer incurs a substantial financial cost despite the economic benefit of the tax deduction allowed for the contribution. By contrast, the Arizona statute provides a dollar-for-dollar tax credit for so-called "contributions" to school tuition organizations. As noted in *Hibbs* at 95, such a "contribution" costs the taxpayer nothing as long as the taxpayer has a state tax liability equal to or greater than the amount contributed. Whether the taxpayer makes a $500 payment to an STO or the Department of Revenue, she is in either case making a payment in satisfaction of a $500 tax liability and thereby receives a $500 tax credit. The STOs are thus in receipt of tax payments, as the Ninth Circuit noted when it stated, "By structuring the program as a dollar-for-dollar tax credit, the Arizona legislature has effectively created a grant program whereby the state legislature's funding of STOs is mediated through Arizona taxpayers." *Winn I*, 562 F.3d at 1010. The STOs are thus funded by the state legislature and are receiving tax dollars, not private charitable contributions.

The present case thus fits squarely within the facts of *Flast* and *Bowen v. Kendrick*, 487 U.S. 589 (1988) in that the statute authorizes the funding of religious organizations (religious STOs) with tax

dollars.[13] The only difference between the present case and *Flast* and *Bowen* relates to the method or mechanics by which religious entities receive tax dollars. In the present case, tax dollars are transferred *directly* from taxpayers to religious STOs without first passing through the State Treasury. In *Flast* and *Bowen*, by contrast, there was no direct transfer of funds from taxpayers to religious entities. Instead, tax dollars were first paid into the Federal Treasury by taxpayers and later on amounts were distributed from the Treasury to religious grantees or to other entities that, in turn, made distributions to religious grantees. The precise method or mechanics by which tax dollars flow to religious entities has no constitutional significance for purposes of standing to sue. The only relevant inquiry under *Flast* is whether there is a nexus between the plaintiff's status as a taxpayer and the legislation at issue.

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[13] It might be argued, in the alternative, that the dollars paid to STOs are not tax payments but, instead, voluntary charitable contributions for which a tax incentive (credit) is granted by the state legislation. Even under this view, a taxpayer would have standing to challenge the operation of the Arizona statute. In *Flast*, the Court emphasized that there was a nexus between the plaintiff's status as a taxpayer and the exercise of Congressional power under the Taxing and Spending Clause. The particular facts of *Flast* involved government spending but the rationale of *Flast* would permit an Establishment Clause challenge to any action under the Taxing and Spending Clause, not merely to legislative spending. There is obviously a nexus between a plaintiff's status as a taxpayer and the tax legislation (e.g., the tax credits at issue). Under this alternative view, Respondents have standing to challenge the Arizona tax credits even if the statute is considered to establish a private, rather than governmental, funding of STOs.

The nexus requirement is met in the present case because the respondent-taxpayers are objecting to the religious use of what would otherwise be tax dollars authorized by the Arizona legislature. The required nexus between the plaintiff's status as a taxpayer and the government-foregone tax dollars at issue is at least as substantial as the nexus between the plaintiff's status as a federal taxpayer and the government-appropriated tax dollars at issue in *Flast*. Further, the injury in both *Flast* and the present case is for all practical purposes the same—the expenditure of tax dollars for religious purposes. It cannot be known whether, or to what degree, the expenditure of tax dollars for religious purposes will increase the plaintiff's tax liability or reduce the level of government services the plaintiff receives. In both *Flast* and the present case it is the religious expenditures made with tax dollars or the equivalent, rather than their economic impact on the plaintiff, that create taxpayer standing.

Petitioners may argue that Respondents do not meet the first prong of the *Flast* test because the Arizona statute is not a "congressional action under the taxing and spending clause," that is, under Art. I, § 8 of the Constitution. It is true that *Flast* involved a congressional appropriation under Art. I, §8, and Section 1089 was enacted pursuant to the taxing and spending clause of Ariz. Const. art. IX, §3. But it is apparent from *Flast* and other cases that no meaningful distinction can be drawn between a state taxpayer's Establishment Clause challenge to state legislative spending and a federal taxpayer's Establishment Clause challenge to Congressional spending. An Establishment Clause

exception to the general rule against taxpayer standing applies, whether the challenge is to federal or state legislative spending. In *DaimlerChrysler* this Court made it clear that the general rule against taxpayer standing applies to state as well as federal taxpayers. *DaimlerChrysler*, 547 U.S. at 345. If the general rule applies equally to state as well as federal taxpayers, then so should the Establishment Clause exception to the general rule apply in exactly the same way to state as well as federal taxpayers.

2. State taxpayer standing under *Doremus*.

Some argue that *Doremus* controls state taxpayer standing cases, leaving *Flast* to control federal taxpayer standing cases. *Amici* are of the view that the Court's decisions in *Doremus* and *Flast* are consistent with one another and both should guide the Court in determining whether a taxpayer—state or federal—has Article III standing. Under each of these cases the taxpayer has standing when a substantial amount of tax dollars is spent in support of religion pursuant to statutory authorization (as opposed to purely Executive action). Thus, in *Doremus* the Court explained that *Everson* was a case where there was a "measurable appropriation or disbursement of school district funds occasioned solely by the activities complained of." *Doremus*, 342 U.S. at 434. By contrast, in *Doremus* there was no such measurable appropriation or disbursement of government funds because the Bible readings at issue did not increase the cost of running the school. If the Bible readings had increased the cost of running the school, the Court suggested that the plaintiffs would have had standing. *Id.* at 433.

Unlike *Doremus*, Arizona's statute involves substantial legislative funding of STOs. As explained above, the statute for all practical purposes authorizes the payment of tax dollars to STOs that would otherwise have been made to the Department of Revenue.

Thus, whether the Court applies the standing requirements laid out in *Flast* or *Doremus*, Respondents have standing in this case.

C. For more than sixty years the Supreme Court and lower courts have granted taxpayer standing in Establishment Clause cases; this practice is entitled to deference and respect.

This Court formally recognized and approved state and federal taxpayer standing in *Doremus* and *Flast*. Even before those cases were decided, the concept of taxpayer standing existed, although it was not given any detailed explanation by the courts. For example, in *Everson* at 3, the Court noted that "[t]he appellant, in his capacity as a district taxpayer filed suit in a state court," and the Court thus recognized the plaintiff's standing to sue as a taxpayer. No allegation was made in *Everson* that the taxpayer plaintiff had incurred, or would incur, any measurable pecuniary injury due to the school board's reimbursement policy for the costs of bus transportation. In particular, no allegation was made that the plaintiff faced an increased tax liability as a consequence of the unconstitutional expenditure of government funds. The plaintiff

nonetheless had standing to sue.

By contrast, in *Doremus*, 342 U.S. at 433-435, the Court held that it lacked jurisdiction to hear the taxpayer challenge a New Jersey statute requiring Bible reading in public schools. Crucial to the Court's decision was that there was no allegation by the plaintiff that the Bible reading was "supported by any separate tax, or paid for from any particular appropriation, *or that it adds any sum whatever to the cost of conducting the school.*" *Id.* at 433 (emphasis added). The difference between the two cases is clear. Unlike *Doremus*, in Everson substantial government expenditures were associated with the government activities challenged under the Establishment Clause; there was "a measurable appropriation or disbursement of school district funds occasioned solely by the activities complained of." *Id.* at 434. The existence of the allegedly unconstitutional government spending was sufficient, *by itself*, to confer standing on the plaintiff in *Everson*. Similarly, in the present case, the plaintiffs have standing based on the unconstitutional diversion of tax payments to STOs. It is not necessary under *Doremus* (or *Flast*) for the Respondents in the present case to allege that Arizona's tax credit program results in an increase in their tax liabilities or that a decrease in tax liabilities will occur if the tax credit program is halted.

The *amicus* brief of the Becket Fund refers to fourteen cases[14] since *Doremus* "where the Court

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[14] *See* *Walz v. Tax Comm'n*, 397 U.S. 664, 666 (1970); *Lemon v. Kurtzman*, 403 U.S. 602, 611 (1971); *Sloan v. Lemon*, 413 U.S.

apparently assumed the existence of state taxpayer standing without ever analyzing the question" and three cases[15] decided by the Court in which "the Court found standing in passing, but did not examine the question of state taxpayer standing in any detail." Brief *Amicus Curiae* of the Becket Fund for Religious Liberty Supporting Petitioners, *ACSTO v. Winn*, Nos. 09-987 and 09-991 (2010), at 5-7.

The Becket Fund and the Petitioners attach no significance to these cases because they do not directly address the issue of standing to sue. *Amici* view these cases differently. While the cases do not directly analyze issues of standing, they are instructive in that they implicitly recognize the litigants' standing to sue. The cases should be given respect and deference. They can best be understood as clarifying and illustrating the principles of

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825, 827 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 762 (1973); *Hunt v. McNair*, 413 U.S. 734, 735 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 478 (1973); *Marburger v. Public Funds for Public Schools of New Jersey*, 417 U.S. 961 (1974) (mem.); *Griggs v. Public Funds for Public Schools of New Jersey*, 417 U.S. 961 (1974) (mem.); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 744 (1976); *Wolman v. Walter*, 433 U.S. 229, 232 (1977); *Mueller v. Allen*, 463 U.S. 388, 392 (1983); *Board of Education of Kiryas Joel School District v. Grumet*, 512 U.S. 687, 694 n.2 (1994); *Mitchel v. Helms*, 530 U.S. 793 (2002) (plurality op.); *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002).

[16] *Meek v. Pittenger*, 421 U.S. 349, 355 n.5 (1975), overruled by *Mitchell v. Helms*, 530 U.S. 793, 808 (2002); *Marsh v. Chambers*, 463 U.S. 783, 785 n.4 (1983); *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), overrule by *Agostini v. Felton*, 521 U.S. 203 (1997).

taxpayer standing discussed in *Doremus*, *Flast* and *DaimlerChrysler*.

The Supreme Court and lower courts would not have exercised jurisdiction in the cases cited by the Becket Fund had there been real doubts as to the presence of standing.[16] This is especially true given the courts' *independent* obligation to determine *sua sponte* whether plaintiffs have standing, even when the parties do not raise the issue. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-231 (1990). Standing is an aspect of Article III jurisdiction and a court must determine whether it has Article III jurisdiction; the court cannot shirk this responsibility. In the cases noted by the Becket Fund, standing was assumed to exist. The failure to address standing was not due to the incompetence of the litigants or their attorneys, or to judicial incompetence. The most likely explanation is that standing was obviously present in these cases and it would not have occurred to anyone to question whether the plaintiff had standing.

While these Supreme Court cases lack any analysis of standing, the uniform past practice of exercising jurisdiction in these cases is entitled to respect and deference, just as it was in *Hibbs*. In *Hibbs*, this Court recognized that the consistent past practice of exercising jurisdiction in similar cases was highly relevant in determining whether the Tax Injunction Act, 28 U.S.C. § 1341, barred the present

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[16] In *Valley Forge*, 454 U.S. at 475-476, the Court said: "Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States."

lawsuit and deprived the courts of jurisdiction.[17] Just as the Court looked to past practice in determining whether the TIA barred this suit, so too should the Court now look at the past practices of the Court and lower courts in resolving the issue of state taxpayer standing. It is often said that "actions speak louder than words." This proverbial saying applies in the present case.

Amici would also like to call the Court's attention to several Circuit Court opinions that explicitly discuss the issue of state taxpayer standing or imply that taxpayers have standing to challenge state and federal tax benefits for religion. In *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514, 516 n.3 (3rd Cir. 1979), the Third Circuit *explicitly* concluded in footnote 3 of its opinion that the plaintiffs had state taxpayer standing under *Flast*. Tellingly, this Court affirmed the Third Circuit's decision in *Byrne*, see 442 U.S. 907 (1979), and the

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[17] The *Hibbs* Court stated as follows (542 U.S. at 110-112):

> [N]umerous federal-court decisions—including decisions of this Court reviewing lower federal-court judgments—have reached the merits of third-party constitutional challenges to tax benefits without mentioning the TIA. ...
>
> In a procession of cases not rationally distinguishable from this one, no Justice or member of the bar of this Court ever raised a §1341 objection that, according to the petitioner in this case, should have caused us to order dismissal of the action for want of jurisdiction. ... Consistent with the decades-long understanding prevailing on this issue, respondents' suit may proceed without any TIA impediment.

Court cannot be assumed to have ignored footnote 3 in the Third Circuit's opinion.

In *Johnson v. Econ. Dev. Corp. of County of Oakland*, 241 F.3d 501 (6th Cir. 2001), the court held that Michigan taxpayers had standing to challenge the issuance of tax-exempt revenue bonds to finance the construction of buildings at a Catholic school. Relevant to the present case, the Sixth Circuit rejected a distinction asserted by the defendant between legislative expenditures for religion and a loss of tax revenues due to tax exemptions for religion. Either may be challenged by state taxpayers. *Johnson*, 241 F.3d at 507-508. The present case is even a stronger one for concluding that the plaintiff has standing. In *Johnson*, a Catholic school was the indirect beneficiary of tax-exempt bond financing (the bondholders received the direct benefit of the exemption). In the present case, religious schools receive actual tax revenues.

In *Warren v. Commissioner*, 302 F.3d 1012, 1015 (9th Cir. 2002) ("*Warren II*"), the Court stated that Professor Erwin Chemerinsky would have standing under *Flast* if he sued as a taxpayer to challenge §107(2) of the Internal Revenue Code, under which clergy are entitled to receive tax-exempt housing allowances. In *Warren v. Commissioner*, 282 F.3d 1119 (9th Cir. 2002) ("*Warren I*"), the Ninth Circuit *sua sponte* raised the constitutionality of §107(2) and appointed Professor Chemerinky as amicus to advise the court on the constitutional issue. The constitutional issue was not resolved because Congress enacted legislation that mooted the tax

issue on appeal, a technical dispute as to the dollar amount that could be excluded from gross income by the taxpayer. Because the case had become moot due to the legislation, the Ninth Circuit dismissed the appeal. In denying Professor Chemerinsky's motion to intervene as a party in the case, the court stated that he would have standing if he filed suit as a taxpayer to challenge the constitutionality of section 107(2). *Warren II*, 302 F.3d at 1015.

In *Abortion Rights Mobilization, Inc. v. Baker*, 885 F.2d 1020 (2d Cir. 1989), the plaintiffs alleged that the IRS and the Treasury were ignoring the Catholic Church's violations of the ban against lobbying and political activity in § 501(c)(3) of the Internal Revenue Code. Plaintiffs were thus challenging the government's failure to enforce the requirements of § 501(c)(3). As the Court stated, the plaintiffs "do not challenge Congress' exercise of its taxing and spending power as embodied in § 501(c)(3) of the Code; they do not contend that the Code favors the Church." *Id.* at 1028. The obvious implication of the quoted language is that the plaintiffs would have been held to have standing as taxpayers if they had challenged § 501(c)(3) itself or if they had alleged that, in properly administering the Code, the IRS granted tax benefits to the Church. The actual case involved the opposite allegation—that the government was improperly administering the Code. That permitted the Second Circuit to conclude that the plaintiffs did not have standing because there was "no nexus between plaintiffs' allegations and Congress' exercise of its

taxing and spending power." *Id.*[18]

Since *Everson*, the Court and lower courts have "repeatedly decided Establishment Clause challenges brought by state taxpayers against state tax credit, tax deduction and tax exemption policies, without ever suggesting that such taxpayers lacked Article III standing," as noted by the Ninth Circuit in this case. *Winn I*, 282 F.3d at 1010. The Ninth Circuit's ruling in this case is consistent with the longstanding practice of this Court in ruling on the merits in cases such as *Walz*, *Hunt*, *Mueller* and *Nyquist*. The Ninth Circuit's ruling is also consistent with the explicit holdings on taxpayer standing by the Third and Sixth Circuits in *Byrne* and *Johnson* and with the opinions of the Ninth and Second Circuits in *Warren II* and *Abortion Rights Mobilization*.[19]

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[18] The description of this case is based on a recent article in Tax Notes. *See* Michael L. Gompertz, *Lawsuit Challenges Income Tax Preferences for Clergy*, 128 Tax Notes 81, 92 (July 5, 2010)

[19] The Ninth Circuit's ruling is also consistent with a recent federal district court ruling, *Freedom From Religion Foundation, Inc. v. Geithner*, 2010 U.S. Dist. LEXIS 50413 (May 21, 2010), holding that a federal taxpayer has standing to challenge tax benefits for clergy under § 107 of the Internal Revenue Code. A commentator has provided an extensive discussion of this case and concludes that the court correctly held that taxpayers have standing to challenge §107. *See* Michael L. Gompertz. *Lawsuit Challenges Income Tax Preferences for Clergy*, 128 Tax Notes 81, 91-94 (July 5, 2010).

III. THE PURPOSE OF "STANDING" IS TO ENSURE A REAL "CASE OR CONTROVERSY," NOT TO INSULATE THE ACTS OF GOVERNMENT FROM JUDICIAL REVIEW.

The enforcement of fundamental rights guaranteed by the Constitution requires access to the Courts. As the Court stated in *Marbury*, 5 U.S. at 166:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

When the Establishment Clause is violated by governmental funding of religion as in the present case, there is a clear need for a judicial "remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric." *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). While Chief Justice Burger's statement was made in reference to violations of the Fourth Amendment, its logic is equally applicable to Establishment Clause violations. To deny standing in the present case would be to deny an effective

remedy for violations of fundamental rights, thus transforming the protections of the Establishment Clause into "little more than rhetoric."

Although the federal courts may not seek out and strike down any governmental act that they deem to be repugnant to the Constitution, the Courts are obliged to do so when the question is raised by a party whose interests entitle him to raise it. *Hein*, 551 U.S. at 598.

In this case, the Respondents—as taxpayers who have been harmed by state action—are entitled to raise the constitutional question of whether Section 1089 violates the Establishment Clause. Section 1089 infringes upon the liberty rights of all Arizona citizens. Standing is fully warranted in this case because our nation's history "vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast*, 392 U.S at 103-04.

Under our system of governance, Arizonans who are harmed by Section 1089 are entitled to constitutional protection from the majoritarian political process and its favoring of religion. If the Court renounces more than six decades of legal precedent and denies Respondents standing, it will immunize the government from accountability for Establishment Clause violations to the detriment of the civil liberties of the People.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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September 22, 2010

APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association advocates for the rights and viewpoints of humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist philosophy. Most recently, the American Humanist Association filed *amicus* briefs with the Court in *Christian Legal Society v. Martinez*, No. 08-1371, 561 U.S. __ (2010), *Salazar v. Buono*, No. 08-472, 559 U.S. __ (2010) and *Pleasant Grove City v. Summum*, No. 07-665, 555 U.S. ___ (2009).

The American Ethical Union is a federation of Ethical Culture/Ethical Humanist Societies and circles throughout the United States. Ethical Culture is a humanistic religious and educational movement inspired by ideal that the supreme aim of human life is working to create a more humane society. The American Ethical Union has participated of the years in a number of *amicus curiae* briefs in defense of religious freedom and church-state separation.

The Atheist Alliance International is an organization of independent religion-free groups and individuals in the United States and around the world. Its primary goals are to help democratic, atheistic societies become established and work in coalition with like-minded groups to advance rational thinking through educational processes. Through the Alliance, members share information and cooperate in activities with a national or international scope.

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to fostering a secular society based on science, reason, freedom of inquiry, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy. CFI maintains that the boundaries between government and religion are an essential part of our free society, and that ensuring that government does not impermissibly endorse or favor religion is critical to maintaining those boundaries. CFI has participated as an *amicus* in several prominent cases, including *Salazar v. Buono*, 129 S. Ct. 1313 (2009) and *Christian Legal Society v. Martinez*, 130 S. Ct. 795 (2009).

The Council for Secular Humanism ("Council") is a nonprofit educational organization headquartered

in Amherst, New York. The Council engages in a variety of activities that are designed to support institutions, principles, and values that are consistent with a secular worldview. The Council has participated as an *amicus* in several prominent cases, including *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

The Freedom From Religion Foundation ("Foundation"), a national nonprofit organization based in Madison, Wisconsin, is currently the largest national association of freethinkers, representing atheists, agnostics and others who form their opinion about religion based on reason rather than faith, tradition or authority. The Foundation's two purposes are to educate the public about nontheism, and to defend the constitutional principle of separation between state and church. The Foundation has members in every state in the United States and in the District of Columbia and Puerto Rico. The Foundation's membership, which is dedicated to the principle of separation between state and church, includes college/university students across the country. Moreover, the Foundation offers annual scholarships to college students and college-bound high school seniors, which are awarded through an essay competition. This is one of the few programs in the country awarding scholarships to freethinking and nonreligious students for their independent views. The Foundation receives thousands of applications for this program each year, further demonstrating students' keen interest in keeping state and church separate.

The Institute for Humanist Studies (IHS) is a think tank whose mission is to promote greater public awareness, understanding and support for humanism. The Institute specializes in pioneering new technologies and methods for the advancement of humanism. In all its work, the Institute aims to exemplify the humanist values of reason, innovation, and cooperation. In its efforts to support humanism it seeks to defend the constitutional rights of religious and secular minorities by directly challenging clear violations of the law where it relates to the First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is their stance that the role of the government is to show no preference for one religion over another nor to provide support for a religious idea when there is no identifiable secular purpose. As a non-membership organization, the IHS is able to complement other humanist organizations and cooperate with other humanist groups to ensure that no member of society is discriminated against because of religion or lack thereof.

The Secular Coalition for America is a 501(c)4 advocacy organization located in Washington, D.C. whose purpose is to amplify the diverse and growing voice of the nontheistic community in the United States. SCA lobbies the U.S. Congress on issues relevant to secular Americans including the federal funding of religious schools and separation of church and state.

The Secular Student Alliance is a network of over 200 atheist, agnostic, humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States with the vast majority of its affiliates at high schools and colleges. The mission of the Secular Student Alliance is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

The Society for Humanistic Judaism mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. The Society's members want to ensure that they, as well as people of all faiths and viewpoints, will not be discriminated against by government favoring of any one religion over another or theistic religion over humanistic religion.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States and North America. Through its democratic process, the

Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom. General Assemblies of the Association have repeatedly opposed direct and indirect public aid to sectarian private schools.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 22 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, ET AL.,
Respondents.

GALE GARRIOTT,
Petitioner,

v.

KATHLEEN M. WINN, ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN JEWISH COMMITTEE, THE ANTI-DEFAMATION LEAGUE, THE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, AND THE INTERFAITH ALLIANCE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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September 22, 2010

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Interest Of *Amici Curiae*

Americans United for Separation of Church and State ("American United") is a national, nonsectarian public interest organization based in Washington, D.C.[1] Its mission is twofold: (1) to advance the free-exercise right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the Court's leading church-state cases, including cases featuring Establishment Clause challenges to government funding of religious schools.

American Jewish Committee ("AJC"), a global Jewish advocacy organization with over 175,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC has always supported the constitutional principle of separation of religion and government and believes that it is improper for the government to fund religious activities.

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[1] Each party has filed a letter with the Court consenting to the filing of amicus briefs. Pursuant to Rule 37.6, counsel for *amici curiae* states that no party or party's counsel authored or funded this brief in whole or in part. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

The Baptist Joint Committee for Religious Liberty ("BJC") is a 74 year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting individuals and congregations throughout the nation. The BJC deals exclusively with religious liberty issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The BJC believes that while tax expenditures (such as deductions and credits) and government grants may have the same economic effect on the government, and should be treated the same for the purposes of standing, their constitutional impact is not the same. The constitutional question turns on considerations distinct from those that guide the standing inquiry. The BJC has participated as *amicus curiae* in many of the major religious liberty cases before the Supreme Court.

Interfaith Alliance Foundation ("Interfaith Alliance") celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country made up of 75 different faith traditions as well as from no faith tradition. As a vital part of its work promoting and protecting a pluralistic democracy, Interfaith Alliance supports people who believe that their religious freedoms have been restricted.

Summary Of Argument

Petitioner Arizona Christian School Tuition Organization ("ACSTO") advances a theory of taxpayer standing that would enable the legislature to inflict, through tax credits, the very harms that the Establishment Clause is designed to prohibit. Acceptance of ACSTO's argument would undermine Establishment Clause principles and upend decades of settled jurisprudence.

The Arizona legislature has enacted a law, Ariz. Stat. § 43-1089 ("Section 1089"), that enables Arizona residents to direct part of their tax payments to licensed school tuition organizations that provide scholarships to Arizona students. An overwhelming majority of the resulting scholarships are awarded by religious organizations and support students who attend religious schools. *See* Winn Br. at 9, 12. The plaintiffs allege that Section 1089 violates the Establishment Clause.

The Arizona Department of Revenue does not challenge the plaintiffs' standing to raise this Establishment Clause claim and instead defends Section 1089 on the merits. *See, e.g.*, Garriott Br. at 17–21. The dissenters in the Court of Appeals likewise did not question the plaintiffs' standing. *See* ACSTO Pet. App. 83a–110a.

ACSTO, however, contends that the plaintiffs lack standing to challenge Section 1089. It asks the Court to embrace an unprincipled distinction between tax credits and cash grants—a distinction long rejected by federal and state governments, including Arizona. This distinction also contradicts many of the Court's key Establishment Clause decisions and would preclude taxpayers from challenging even overt attempts to subsidize religion through tax credits.

I. The Court's decision in *Flast* v. *Cohen*, 392 U.S. 83 (1968), makes clear that taxpayers have standing to bring Establishment Clause challenges to government outlays. ACSTO claims that, for the purpose of standing, tax expenditures, including tax credits, are functionally different than cash grants. They are not. Governments, federal and state, have long recognized that tax credits and cash grants have virtually identical economic effect. The Arizona Department of Revenue itself classifies Section 1089 as a "tax expenditure."

To distinguish the two types of spending in the context of standing analysis would call into question numerous cases in which the Court addressed the merits of Establishment Clause challenges to tax

credits and tax deductions without raising any questions about the taxpayers' standing. Such a distinction, moreover, would condition Article III standing on a formality and would prevent taxpayers from challenging even tax credits reserved exclusively for churches or religious schools.

II. The role of taxpayers or scholarship organizations under the statutory scheme does not, as ACSTO contends, deprive the plaintiffs of standing to challenge Section 1089. The plaintiffs satisfy the legislative-nexus requirement, identified by the Court in *Flast* and clarified in *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), because the challenged tax credits are specifically authorized by Section 1089, a legislative enactment. The Court has addressed Establishment Clause challenges notwithstanding the presence of discretion-exercising intermediaries, be they Cabinet Secretaries (*Bowen*) or parents (*Zelman*).

In any event, the legislative-nexus requirement does not apply when the challenge is to a state program. *Flast* and *Hein* involved challenges to federal action, and the rationale set forth in those cases reflects uniquely federal concerns: Congress's exclusive responsibility for taxing and spending, an arrangement from which many states, Arizona included, deviate; and the U.S. Constitution's separation of powers, which does not apply to state governments. The Court need not and should not reach this question, however, as it was not addressed below, has not been briefed here, and is not necessary to resolve the standing inquiry.

In sum, the plaintiffs have standing to raise the important Establishment Clause questions presented by Section 1089, and the Court can and should consider those questions on the merits.

Argument

I. Tax Expenditures Cause The Same Injury To Taxpayers As Do Cash Grants.

ACSTO argues that Arizona taxpayers lack standing to challenge Section 1089 because the Arizona legislature funds religious education through tax credits, rather than through cash grants. *See, e.g.*, ACSTO Br. at 15–20. Yet when it comes to Article III standing, there is no relevant distinction between government spending through direct expenditures and government spending through tax expenditures, including tax credits. As the Court has explained in its Establishment Clause cases, "[e]very tax exemption constitutes a subsidy that affects non-qualifying taxpayers." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989).

A. The Economic Effect Of Tax Expenditures Is Identical To That Of Direct Appropriations.

The federal government and state governments—including Arizona—have long recognized that there is no practical difference between a governmental expenditure that takes the form of an outlay and one that takes the form of a tax deduction or tax credit. In each case, the government provides, to a third party, funds that would otherwise go to the treasury. The Court of Appeals thus correctly ex-

plained that "Section 1089 works the same as if the state had given each taxpayer a $500 check that can only be endorsed over to a STO or returned to the state." ACSTO Pet. App. 13a.

1. In November 1967, Assistant Secretary of the Treasury for Tax Policy Stanley S. Surrey proposed that the federal government create a "tax expenditure budget" to "report the revenue cost of deliberate departures from accepted concepts of net income . . . through which our tax system does operate to affect the private economy in ways that are usually accomplished by expenditures—in effect to produce an expenditure system described in tax language." Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 Tax L. Rev. 187, 200 (2004) (quoting Stanley S. Surrey, *Pathways to Tax Reform* 3 (1973)) (quotations and alteration omitted). His proposal became the norm, and the equivalence of direct expenditures and tax expenditures "has become widely accepted in federal tax and spending policy." Donna D. Adler, *The Internal Revenue Code, The Constitution, and The Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L. Rev. 855, 861 (1993).

Indeed, since the early 1970s, federal tax law has defined "tax expenditures" as "those *revenue losses* attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3(a)(3), 88

Stat. 297 (1974) (emphasis added). According to the Joint Committee on Taxation, "[s]pecial income tax provisions are referred to as tax expenditures because they may be considered to be analogous to direct outlay programs, and the two can be considered as alternative means of accomplishing similar budget policy objectives." Staff of Joint Committee on Taxation, 109th Congress, *Estimates of Federal Tax Expenditures for Fiscal Years 2006-2010* 2 (Comm. Print 2006).

Congress recognizes that tax expenditures—including "educational assistance" and "tuition reduction benefits," *id.* at 4—"are similar to those direct spending programs that are available as entitlements to those who meet the statutory criteria established for the programs." *Id* at 2. Thus, "[a]n alternative way to measure tax expenditures is to express the values in terms of an 'outlay equivalents'"—"the dollar size of a direct spending program that would provide taxpayers with net benefits that would equal what they now receive from a tax expenditure." Staff of Joint Committee on Taxation, 110th Cong., *A Reconsideration of Tax Expenditure Analysis* 81 n.175 (Comm. Print 2008).

Experts on state taxation likewise recognize that many "'subsidy' or 'relief' measures are spending programs implemented through the tax system," that "they commonly are known as tax expenditures," and that a tax expenditures "can be viewed as if the taxpayer had actually paid the full amount of tax owed in the absence of the special provision and had simultaneously received a grant equal to the savings

provided by the special provision." Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 Cap. U. L. Rev. 373, 452–53 (1993). *See also, e.g.*, Adler, *supra*, at 858 ("In effect, a tax exemption works like a direct grant. It is as if the taxpayer incurred and paid a tax liability, and the government gave the taxpayer a direct subsidy for the same amount."). In sum, "a tax expenditure is just one of a number of ways of providing governmental assistance." Pomp, *supra*, at 453.

2. Arizona has embraced the concept of a "tax expenditure" and applied it directly to Section 1089.

For decades, Arizona has defined a "tax expenditure" as "any tax provision in state law which exempts, in whole or in part, any persons, income, goods, services or property from the impact of established taxes including deductions, subtractions, exclusions, exemptions, allowances and credits." Ariz. Stat. § 42-1005(A)(4). The Director of Arizona's Department of Revenue is required to "issue a written report to the governor and legislature detailing the approximate costs"—"in lost revenue"—"for all state tax expenditures." *Id.* Because tax expenditures "result in a loss of tax revenues, thereby reducing the amount of revenues available" to the state, "the fiscal impact of implementing a tax expenditure would be similar to a direct expenditure of state funds." Office of Econ. Research & Analysis, Ariz. Dep't of Revenue, *The Revenue Impact of Arizona's Tax Expenditures FY 2008/09* 1 (2009). Accordingly, the Arizona De-

partment of Revenue states that Section 1089 created a "tax expenditure." *Id.* at 47.[2]

ACSTO relies on the Arizona Supreme Court's holding in *Kotterman* v. *Killian*, 972 P.2d 606 (Ariz. 1999) (en banc), that the challenged progrma's tax credits do not constitute "public money," *id.* at 618, and that their disposition is not a state expenditure. ACSTO Br. at 42. But this holding related not to standing, but to the merits of the plaintiffs' claim under the Religion Clauses of Arizona's state constitution. *See id.* at 616-25. As in *Mueller* and *Walz*, the legality of an expenditure on the merits does not strip the plaintiffs of standing to challenge it. Moreover, even if it did, the Arizona Supreme Court's ruling would not bind this Court on a question of federal constitutional law.

B. The Court Has Consistently Considered Taxpayers' Establishment Clause Challenges To Tax Expenditures

The Court's precedents do not support ACSTO's standing argument. To the contrary, the Court has routinely considered taxpayers' challenges to tax credits and exemptions—in decisions ranging from *Walz* to *Hunt* to *Nyquist* to *Mueller*—without ever suggesting that the plaintiffs lacked Article III

[2] This Court, in describing its analysis of Section 1089 in *Hibbs* v. *Winn*, 542 U.S. 88 (2004), likewise characterized the challenged credit as a "tax expenditure." *Texas* v. *Commerce Energy, Inc.*, 130 S. Ct. 2323, 2335 (2010).

standing.[3] And the Court has summarily affirmed lower-court decisions holding that the taxpayers had standing to bring Establishment Clause challenges to tax credits. *See, e.g.*, *Byrne* v. *Pub. Funds for Pub. Sch. of N.J.*, 442 U.S. 907 (1979), *aff'g* 590 F.2d 514, 516 n.3 (3d Cir. 1979) (in challenge to tax credit, "[t]he individual plaintiffs, as taxpayers, have standing under *Flast* v. *Cohen*").

ACSTO attempts to dismiss all of these cases on the ground that the Court did not specifically address the plaintiffs' standing. ACSTO Br. at 13 n.7. But the repeated exercise of jurisdiction suggests that the Court understood that Article III was satisfied. The Court has explained: "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307 (1962) (citations omitted). *See also S. Cent. Bell Tel. Co.* v. *Ala.*

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[3] *See Walz* v. *Tax Comm'n*, 397 U.S. 664, 667 (1970) ("appellant's contention was that the . . . grant of [a tax] exemption to church property indirectly requires [him] to make a contribution to religious bodies"); *Hunt* v. *McNair*, 413 U.S. 734, 739 (1973) (challenge by "a South Carolina taxpayer" to issuance of tax-exempt bonds for benefit of religious college); *Comm. For Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 762 (1973) (challenge by "residents and taxpayers in New York" to income tax benefits to parents of children attending parochial schools); *Mueller* v. *Allen*, 463 U.S. 388, 392 (1983) (challenge by "certain Minnesota taxpayers" to state law that provided tax deduction for religious school expenses).

bama, 526 U.S. 160, 166 (1999) (refusing to "revisit . . . a long-established and uniform practice" in the exercise of Article III jurisdiction). The Court can—and does—raise the question of standing on its own. *See DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005) (Mem.) (granting petition for certiorari: "In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether respondents have standing to challenge Ohio's investment tax credit.") (citation omitted). Thus, when the Court reaches the merits of an Establishment Clause case, it is not by accident.

ACSTO's standing argument also contradicts the Court's repeated recognition that tax expenditures have the same economic effects as direct subsidies:

- "Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983).

- "Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system.' . . ." *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting).

- "A tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy. In one instance, the government relieves religious entities (along with others) of a generally applicable tax; in the other, it relieves religious entities (along with others) of some or all of the burden of that tax by returning it in the form of a cash subsidy. Whether the benefit is provided at the front or back end of the taxation process, the financial aid to religious groups is undeniable." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 859–60 (1995) (Thomas, J. concurring).

- Tax exemptions have "much the same effect as [cash grants]." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 666 (2002) (O'Connor, J., concurring).

In sum, "[t]he only difference [between cash grants and tax credits] is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State." *Comm. For Public Ed. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 791 (1973).

Contrary to ACSTO's position, ACSTO Br. at 36, the plaintiffs' standing to bring this Establishment Clause challenge is unaffected by the Court's decision in *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006). The Court in *Cuno* held that the plaintiffs lacked taxpayer standing to challenge a tax credit under the Commerce Clause, but specifically distinguished the Commerce Clause-based challenge from cases in which plaintiffs seek to vindicate their

rights under the Establishment Clause. *See Cuno*, 547 U.S. at 347 ("only the Establishment Clause has supported federal taxpayer suits since *Flast*") (quotations omitted).

ACSTO also maintains that the plaintiffs lack standing because the "net effect of the tuition tax credit is likely an increase, not a decrease, in revenues." ACSTO Br. at 36. ACSTO's prediction notwithstanding, the immediate effect of Section 1089 is to reduce receipts. If "the Arizona tax credit [is] impermissible under the Establishment Clause, only one remedy would redress the plaintiffs' grievance: invalidation of the credit, which inevitably would increase the State's tax receipts." *Levin* v. *Commerce Energy, Inc.*, 130 S. Ct. 2323, 2336 (2010).

Even if it were possible that Section 1089 might ultimately increase the state's revenue, that residual possibility is irrelevant to the standing inquiry here. In *Cuno*, the Court stressed that unlike suits invoking other constitutional provisions, an injunction against the government's provision of taxpayer funds to support religion redresses the plaintiff's injury "regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *Cuno*, 547 U.S. at 348–49. And because direct cash grants, no less than tax credits, can also serve as investments that provide states with greater net revenue in future years, ACSTO's argument would undermine *Flast* itself—a decision that "is correct and should not be called into question." *Hein*, 551 U.S. at 616 (Kennedy, J., concurring).

C. *ACSTO's Theory Of Standing Would Insulate From Redress The Very Injuries That The Establishment Clause Was Designed To Prevent.*

If the Court were to hold that, for the purpose of standing analysis, tax expenditures differ from cash grants, states could insulate their support of religion from taxpayer challenge merely by employing one government funding mechanism (tax expenditures) over another (cash grants). Under ACSTO's logic, Arizona taxpayers would lack standing to challenge even tax credits reserved for donations to religious schools.

This result cannot be squared with the core purposes of the Establishment Clause. Although the tax credit was not a feature of fiscal policy during the nation's founding, the Court explained in *Flast* that "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103. The forced contributions that Madison feared, *id.*, are no less real when they result from a tax credit or deduction. Indeed, "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'" *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 591 (1983).

If anything, contemporary fiscal politics suggest that the support of religion through tax credits is

even more prone to abuse than is religious support through cash grants. Like most tax cuts, tax expenditures "are subjected to considerably less congressional and popular scrutiny than are direct appropriations." Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 Harv. L. Rev. 491, 493 (1985) (book review). Because they carry fewer political costs than do cash grants, tax expenditures "are now the dominant instruments for implementing new discretionary spending policies." Edward D. Kleinbard, *The Congress Within The Congress: How Tax Expenditures Distort Our Budget and Our Political Process*, 36 Ohio N.U. L. Rev. 1, 18 (2010). If ACSTO's position were adopted, then, taxpayers would lack standing even when the use of these "dominant instruments" to advance religion was most flagrant.

II. Citizens' Private Choice Does Not Strip The Plaintiffs Of Standing.

ACSTO also contends that the presence of private choice—the basis on which the state defends Section 1089 on the merits—severs the nexus between the challenged spending and the Arizona legislature's enactment, such that the plaintiffs cannot satisfy the legislative-nexus requirement announced in *Flast* and refined in *Hein*. *See, e.g.* ACSTO Br. at 23–25. Contrary to ACSTO's contention, however, there is in fact a direct nexus between the legislative enactment, Section 1089, and the challenged subsidy to religion. But even if there were not, the legislative-nexus requirement should not be applied to challenges to state programs, as to which the rationales

underlying the legislative-nexus requirement apply with far less force.

A. There Is A Direct Legislative Nexus Between Section 1089 And The Challenged Subsidy.

Private choice notwithstanding, Section 1089 features a clear legislative nexus. The legislative enactment "has provided only two ways for this money to be spent: taxpayers will either give the dollar to the state, or that dollar (or at least 90 percent of it, after allowable STO administrative expenses) *will* end up in scholarships for private school tuition." ACSTO Pet. App. 14a (emphasis in original). Nothing more is required to confer standing on the plaintiffs.

If private choice severed the requisite nexus, then the Court could not have reached the merits of many of its private-choice cases. *See Zelman*, 536 U.S. at 648–63 (taxpayer Establishment Clause challenge to tuition voucher program where money went to religious institutions through parents); *Mueller* v. *Allen*, 463 U.S. 388, 399 (1983) (taxpayer Establishment Clause challenge to tax deduction for elementary- and secondary-school expenses).

Intervening decisions by the executive branch likewise do not sever the subsidy's nexus to the legislature. For instance, in *Bowen*, the taxpayers' suit was not "any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary." *Bowen* v. *Kendrick*, 487 U.S. 589, 619 (1988). To the contrary, "*Flast* it-

self was a suit against the Secretary of HEW, who had been given the authority under the challenged statute to administer the spending program that Congress had created." *Id.* at 619. Whether made by a cabinet secretary or a scholarship fund, an intervening decision does not break the nexus between the challenged subsidy and the legislature's enactment.

B. State Taxpayer Standing Is Not Subject To The Legislative-Nexus Requirement.

In light of the manifest nexus between the challenged tax expenditure and the Arizona legislature, the Court need not decide the more complex question of whether the legislative-nexus requirement applies in taxpayer challenges to state programs. But even if there were no such legislative nexus here, there are significant reasons to conclude that this requirement applies only to taxpayer challenges to subsidies from the *federal* government.[4]

In *Flast*, the Supreme Court held that to establish standing in an Establishment Clause challenge, "federal taxpayers" must allege an "exercise[] of congressional power under the taxing and spending clause of Art. I § 8 of the Constitution." 392 U.S. at 102. In *Hein*, then, the taxpayers lacked standing because "they [could] cite no statute whose application they challenge[d]." 551 U.S. at 607 (plurality

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[4] A fuller discussion of this issue can be found on pages 20–25 in the Brief in Opposition to the Petition in *Brown* v. *Pedreira*, No. 09-1121.

opinion). This "legislative-nexus requirement" forecloses federal taxpayer standing where a complaint "relies on [the plaintiffs'] taxpayer status as the sole basis for standing to maintain the suit but points to no specific use of Congress' taxing and spending power." *Id.* at 616 (Kennedy, J., concurring).

The rationales underlying the legislative-nexus requirement are far weaker when a taxpayer challenges state expenditures.

First, federal taxpayers are subject to the legislative-nexus requirement because, under the federal Constitution, Congress is responsible for taxing and spending. *See id.* at 602–03 (plurality). Article I delegates the taxing and spending powers to Congress, U.S. Const. art. I, § 8, cl. 1, and prohibits federal expenditures except under authority granted by Congress, *id.* art. I, § 9, cl. 7. By definition, if there is no legislative nexus, then a challenge to a federal program or practice is to something other than taxation or spending.

In many states, however, the power to tax and spend transcends the legislature, and resides at least in part with the executive branch and even the public at large. In Nebraska, a three-fifths majority of the legislature is necessary to override the budget recommendations of the governor. Neb. Const. art. IV, § 7. In Ohio, the public may adopt or reject any item in any appropriations bill. Ohio Const. art. II, § 1(a). In Kentucky, certain types of taxation or spending must be ratified by popular vote. Ky.

Const. § 50.[5] And in Arizona, the state Constitution authorizes citizens, through initiatives or referenda, to allocate funds to "a specific purpose," and permits the legislature to override such allocations only with a three-fourths majority. Ariz. Const. art. IV, § 6(D). With the spending power so diffuse in many states—including Arizona—it makes little sense to incorporate the legislative-nexus requirement wholesale to challenges by state taxpayers.

Challenges to state programs also fail to implicate the separation-of-powers concerns that animate the federal legislative-nexus requirement. The Court in *Hein* observed that the legislative-nexus test stems, in part, from respect for the federal separation of powers. *See* 551 U.S. at 610–612 (plurality opinion); *id.* at 615–18 (Kennedy, J., concurring). The expression of these concerns echoed earlier denials of standing where the judiciary was asked to intervene in the internal operations of the executive branch. *See, e.g.*, *Allen* v. *Wright*, 468 U.S. 737, 761 (1984) (Article III standing arises from "separation of

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[5] *See also, e.g.*, Fla. Const. art. IV, § 13 (if necessary to balance the budget, "the governor and cabinet may establish all necessary reductions in the state budget"); Mich. Const. art. V, § 20 ("The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based."); W. Va. Const. art. VI, § 51 (governor may, with the legislature's consent, "amend or supplement the budget to correct an oversight, or to provide funds contingent on passage of pending legislation").

powers" and counsels against suits to "seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties"); *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972) (no Article III standing where result "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action"); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 129 (1940) (no standing "to represent the public's interest in the [Secretary of Labor's] compliance with the Act").

The "separation-of-powers principle," however, "has no applicability to the federal judiciary's relationship to the States." *Elrod* v. *Burns*, 427 U.S. 347, 352 (1976) (plurality opinion). Thus, the Court has not hesitated to entertain challenges, as to states, that would be foreclosed as to the federal government. *See United States* v. *Gillock*, 445 U.S. 360, 370 (1980) (limits applicable to federal prosecutions of members of Congress did not apply to federal prosecutions of state legislators, in part because those limits arose from federal separation-of-powers); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966) (state could not invoke separation-of-powers doctrine against federal government in challenge to Voting Rights Act).

Accordingly, the limitations that arise in a challenge brought by federal taxpayers are not implicated in a challenge by state taxpayers. Although challenges to state programs do implicate principles of federalism, those principles do not depend on whether a challenged enactment is legislative, executive, or otherwise. *See, e.g.*, *Huffman* v. *Pursue, Ltd.*,

420 U.S. 592, 603–04 (1975) ("Although [a prior decision addressed] a bill seeking an injunction against state executive officers, rather than against state judicial proceedings, we think that the relevant considerations of federalism are of no less weight in the latter setting.").

Ultimately, whatever private choice may exist under the statutory scheme, it was the Arizona legislature that made such choice available. Even if a legislative-nexus requirement were to apply to state taxpayers, the plaintiffs have easily satisfied that requirement here.

Conclusion

The taxpayer plaintiffs' standing to challenge Section 1089 draws on decades of settled jurisprudence. Article III does not prevent the Court from addressing the substantial Establishment Clause issues presented by the plaintiffs' claim.

Respectfully submitted,

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September 22, 2010

AMICUS CURIAE BRIEF

Nos. 09-987, 09-991

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, *ET AL.*,
Respondents.

GALE GARRIOTT, DIRECTOR,
ARIZONA DEPARTMENT OF REVENUE, *Petitioner*,

v.

KATHLEEN M. WINN, *ET AL.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the narrow exception to the general rule against taxpayer standing set forth in *Flast* v. *Cohen* applies to the payment of state taxes.

2. Whether the "endorsement test" under the Establishment Clause should be extended to cover government funding decisions.

3. Whether an Establishment Clause violation may be proved by showing a disparate impact among religions or between religion and non-religion.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation across the country and around the world.

The Becket Fund has also frequently defended governments against overbroad application of the Establishment Clause. Such Establishment Clause abuse often thwarts attempts by governments to include religious institutions in neutral benefit programs—like the one at issue in this case.

The Becket Fund submits this brief because it is concerned that the Ninth Circuit's decision would, if left uncorrected, contribute more confusion to an already confused area of the law and thereby diminish religious liberty for Americans of all different faith traditions.

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[1] The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. This Court has never squarely decided whether state taxpayers have standing under *Flast* v. *Cohen*, 392 U.S. 83 (1968). It should reject the Ninth Circuit's decision that they do. *Flast* is based on the Spending Clause, which governs *Congress's* power to tax and spend—not the independent power of the *States* to do so. The logic of this Court's standing jurisprudence—as set forth in *Flast*, *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006), and *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007)—counsels rejection of Article III standing for state taxpayers.

Rejecting state taxpayer standing would not prevent truly aggrieved plaintiffs from vindicating their interests under the Establishment Clause. To begin with, very few Establishment Clause claims are based on state taxpayer standing alone. The few that are could still be brought in state court, where standing rules are far more lenient. And in keeping with our Nation's commitment to federalism, taxpayers would still have recourse to the political process.

II. This Court should also reject the Ninth Circuit's novel extension of the "endorsement test" to the funding context. This Court has never applied the endorsement test to invalidate a government funding decision. Applying it to Arizona's tax credit program only underlines the long-recognized flaws of the endorsement test. The test is based on the assumption that judges can find "a single 'message' that is conveyed" by government action. *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125, 1136 (2009). That assumption is odd enough in the context of a govern-

ment display, such as a Ten Commandments monument. *Ibid.* But it ventures into the absurd to look for a single "message" in a government's fiscal decisions. What is the single "message" of the capital gains tax? Or the standard deduction? As Freud might have said, sometimes a tax credit is just a tax credit.

III. Finally, by striking down Arizona's tax credit program based on the allegedly "disproportionate" funding for religious schools, the Ninth Circuit adopted a novel disparate impact rule in the Establishment Clause context. Not only is such a rule foreclosed by this Court's existing precedent; it also calls into question hundreds of federal and state statutes that, though neutral, might be alleged to create a disparate impact among religious groups or between religion and non-religion. See Appendix.

ARGUMENT

I. State taxpayers do not have Article III standing.

This Court has never squarely decided whether state taxpayers have standing to assert Establishment Clause claims in district court. They do not. The Ninth Circuit's decision to recognize a *Flast*-like exception to the general rule against state taxpayer standing is at odds with the text of the Constitution, the logic of this Court's taxpayer standing doctrine, and simple prudence.

A. The general rule is that state taxpayers do not have Article III standing.

In *DaimlerChrysler Corp.* v. *Cuno*, a unanimous Court held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpay-

ers." 547 U.S. 332, 346 (2006). The plaintiffs in *Cuno* sought an exception to this rule for Commerce Clause challenges. *Id.* at 347-48. But this Court squarely rejected it, explaining that the injury complained of—the depletion of Ohio's fisc—was neither "concrete and particularized," nor "actual or imminent," but instead "conjectural or hypothetical." *Id.* at 334.

Cuno did not address the question at issue here: whether state taxpayers enjoy an exception to the no-standing rule for Establishment Clause challenges. *Ibid.* But the Court did emphasize that the rationale for rejecting federal taxpayer standing "applies with undiminished force to state taxpayers." *Id.* at 345 (citing *Doremus* v. *Board of Education*, 342 U.S. 429 (1952)).[2] Thus, the default rule is that state taxpayers lack Article III standing. The only question is whether this Court will recognize a *Flast*-like exception for state taxpayers.

B. The Court has never decided whether state taxpayers have Article III standing.

Although this Court has several times assumed that state taxpayers have standing to bring Establishment Clause cases in federal court, it has never squarely addressed the question. Since *Everson* v. *Board of Education* incorporated the Establishment Clause against the states, 330 U.S. 1 (1947), we are aware of eighteen cases where this Court arguably relied on or assumed state taxpayer standing. See

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[2] *Cuno* left the doctrine of municipal taxpayer standing unchanged. 547 U.S. at 349. The interest of municipal taxpayers has typically been viewed as less remote than that of state or federal taxpayers due to "the peculiar relation of the corporate taxpayer to the corporation." *Ibid.* (quoting *Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923)).

infra.[3] In none of these cases did the Court squarely consider state taxpayer standing, much less announce a *Flast*-like exception to the general rule described in *Cuno*. Because such "drive-by jurisdictional rulings * * * have no precedential effect," *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 91 (1998), the availability of taxpayer standing remains an open question.

In the first case to mention state taxpayer standing under the Establishment Clause, *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), the Court held that the plaintiff taxpayers lacked Article III standing. According to the Court, the plaintiffs lacked any "direct and particular financial interest" that was threatened by the unconstitutional conduct; instead, they suffered an injury only "in some indefinite way in common with people generally." *Id.* at 434-35. *Doremus* thus stands for the proposition that there is no state taxpayer standing in the absence of a "direct injury." *Id.* at 434. But it does not resolve the question of whether state taxpayers are entitled to a *Flast*-like exception to the direct injury requirement.

Since *Doremus* there have been, as far as we are aware, fourteen Establishment Clause cases where the Court apparently assumed the existence of state taxpayer standing without ever analyzing the question. See *Walz* v. *Tax Comm'n*, 397 U.S. 664, 666 (1970); *Lemon* v. *Kurtzman*, 403 U.S. 602, 611 (1971); *Sloan* v. *Lemon*, 413 U.S. 825, 827 (1973); *Committee for Public Education and Religious Liberty* v. *Ny-*

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[3] Both *Everson* and *People ex rel. McCollum* v. *Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948) involved municipal taxpayers.

quist, 413 U.S. 756, 762 (1973); *Hunt* v. *McNair*, 413 U.S. 734, 735 (1973); *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472, 478 (1973); *Marburger* v. *Public Funds for Public Schools of New Jersey*, 417 U.S. 961 (1974) (mem.); *Griggs* v. *Public Funds for Public Schools of New Jersey*, 417 U.S. 961 (1974) (mem.); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 744 (1976); *Wolman* v. *Walter*, 433 U.S. 229, 232 (1977); *Mueller* v. *Allen*, 463 U.S. 388, 392 (1983); *Board of Education of Kiryas Joel School District* v. *Grumet*, 512 U.S. 687, 694 n.2 (1994); *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality op.); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648 (2002).[4] In none of these cases did the Court address the standing of the state taxpayer plaintiffs, and none referred to *Doremus* or *Flast*.

In three other post-*Doremus* cases the Court found standing in passing, but did not examine the question of state taxpayer standing in any detail. In *School District of City of Grand Rapids* v. *Ball*, 473 U.S 373 (1985), *overruled by Agostini* v. *Felton*, 521 U.S. 203 (1997), the Court devoted a single line to state taxpayer standing. Rather than analyzing the issue, it "rel[ied] on the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools." *Id.* at 380 n.8. Similarly, in *Marsh* v.

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[4] In three other cases, the Court chose not to rely on state taxpayer standing because alternative grounds for standing were deemed adequate. See *Zorach* v. *Clauson*, 343 U.S. 306, 309 n.4 (1952) (relying on plaintiffs' standing as parents rather than taxpayers); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 211 & 224 n.9 (1963) (same); *Lee* v. *Weisman*, 505 U.S. 577, 584 (1992) (same).

Chambers, the Court said only that the plaintiff, "as a member of the Legislature and as a taxpayer whose taxes are used to fund the chaplaincy, has standing," noting that standing had not been challenged. 463 U.S. 783, 785 n.4 (1983). Finally, in *Meek* v. *Pittenger*, the Court stated in a footnote that the plaintiffs had standing but did not analyze the issue. 421 U.S. 349, 355 n.5 (1975), *overruled by Mitchell*, 530 U.S. at 808.[5]

Because all of these cases assumed Article III standing without squarely addressing whether state taxpayers enjoy it, they are not binding on the question of state taxpayer standing. "'[T]his Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.'" *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 63, n.4 (1989) (quoting *Hagans* v. *Lavine*, 415 U.S. 528, 535, n.5 (1974); alteration in original). See also *Steel Co.*, 523 U.S. at 91 ("drive-by jurisdictional rulings * * * have no precedential effect."). Thus, this Court has never squarely addressed the question *Cuno* left open: Given the general rule against state taxpayer standing, does the Constitution create a special *Flast*-like exception for Establishment Clause claims? As ex-

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[5] In *Texas Monthly* v. *Bullock*, 489 U.S. 1 (1989) (plurality op.), the Court relied on the payment of state taxes as the basis for standing. But there, the plaintiff sought a refund of $149,107.74 in sales taxes it had already paid under protest. *Id.* at 8 (plurality op.). Thus, the plaintiff was not asserting "taxpayer standing" in the typical sense—*i.e.*, an "'indeterminable, remote, uncertain and indirect'" interest in the wholeness of the state treasury—but rather a defined interest in the refund of taxes it had already paid. *Hein*, 551 U.S. at 600 (quoting *Doremus*, 342 U.S. at 433).

plained below, *Flast*, *Cuno*, and *Hein* make clear that it does not.

C. Under the rationale of *Flast*, *Cuno*, and *Hein*, state taxpayers do not have Article III standing.

1. The reasoning of *Flast*, *Cuno*, and *Hein* cannot be reconciled with Article III standing for state taxpayers. *Flast* gave two requirements for federal taxpayer standing. First, the challenged action must be an "exercise[ ] of *congressional power under the taxing and spending clause* of Art. 1, 8, of the Constitution." *Id.* at 102 (emphasis added). Second, the challenged action must exceed "specific constitutional limitations imposed upon the exercise of *the congressional taxing and spending power* * * * ." *Id.* at 102-03 (emphasis added).

This Court has repeatedly refused to extend *Flast* beyond this Spending Clause rationale. In *Cuno*, for example, the plaintiffs sought to extend *Flast* to state taxpayer challenges under the Commerce Clause. But this Court unanimously rejected standing, holding that "a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in our precedent," as well as *Flast*'s "promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances.'" *Cuno*, 547 U.S. at 348 (quoting *Flast*, 392 U.S. at 106). *Cuno* also said that Commerce Clause claims were not "'the specific evils feared'" by the Founders, namely that the federal "'taxing and spending power'" would be used for religious favoritism. *Ibid.* (quoting *Flast*, 392 U.S. at 103).

Similarly, in *Hein*, the plaintiffs sought to extend *Flast* to state taxpayer challenges based on executive, as opposed to legislative, action. Again, this Court rejected standing, explaining that because the challenged expenditures were "not expressly authorized or mandated by any specific congressional enactment, respondents' lawsuit is not directed at an exercise of congressional power, and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'" *Hein*, 551 U.S. at 608-609 (citing *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 479 (1982) and quoting *Flast*, 392 U.S. at 102).

Just as *Cuno* rejected an expansion of *Flast* based on the Commerce Clause, and *Hein* rejected an expansion of *Flast* based on executive action, this Court should reject an expansion of *Flast* based on state tax legislation. The acts of state legislatures simply do not rely on "congressional power" under the Spending Clause—which is the touchstone of *Flast*. As in *Hein*, this Court should "refuse[ ] to extend *Flast* to permit taxpayer standing for Establishment Clause challenges that do not implicate Congress' taxing and spending power." *Id.* at 610 (citations omitted).

Indeed, this is a much easier case than *Hein*. There, the plaintiffs could at least claim that the source of the challenged funding had at one time been appropriated by Congress to the Executive Branch before being disbursed. *Id.* at 605. But here there is no connection at all to Congress or the Spending Clause—the federal government had nothing to do with Arizona's decision to enact the STO program.

The Ninth Circuit attempted to avoid the requirement of "congressional power" by instead relying on what it called Arizona's "equivalent" of the Spending Clause, Article IX § 3 of the Arizona Constitution. *Winn* v. *Arizona Christian School Tuition Organization*, 562 F.3d 1002, 1010 (9th Cir. 2009). As an indication of this sleight-of-hand, it twice revised the phrase "congressional exercise of taxing and spending power" in *Bowen* v. *Kendrick*, 487 U.S. 589, 620 (1988) to read "[legislative] exercise of taxing and spending power." *Winn*, 562 F.3d at 1008, 1010 (quoting *Bowen*, 487 U.S. at 620; alterations in original).

But the Ninth Circuit may not rely on an analogy to *Flast* any more than the plaintiffs in *Cuno* could. First, as a textual matter, the federal Spending Clause and Article IX of the Arizona Constitution are not, as the Ninth Circuit would have it, "equivalent." *Winn*, 562 F.3d at 1010 (citing Ariz. Const. art. IX, § 3). The federal Spending Clause provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

U.S. Const., art. I, § 8. But Article IX of the Arizona Constitution reveals a very different conception of the taxing power:

> Section 3. The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the necessary ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if

> there be any, the legislature shall provide for levying an annual tax sufficient to pay the annual interest and the principal of such debt within twenty-five years from the final passage of the law creating the debt.
>
> No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the tax, to which object only it shall be applied.
>
> All taxes levied and collected for state purposes shall be paid into the state treasury in money only.

Ariz. Const. art. IX, § 3. This Court has warned against comparing constitutional provisions "at such a high level of generality." *Cuno*, 547 U.S. at 348. But under the Ninth Circuit's rule, there would be no real outer bound to the sorts of constitutional provisions that could trigger taxpayer standing under *Flast*.

Second, this Court has repeatedly warned against authorizing federal courts to sit as "continuing monitors of * * * state fiscal administration." *Id.* at 346 (quotation omitted). But if the theory of standing rejected in *Cuno* would have "transform[ed] federal courts into forums for taxpayers' 'generalized grievances,'" the Ninth Circuit's theory would do so even more, by implicating the taxing and spending powers of all 50 states. *Ibid.* (quoting *Flast*, 392 U.S. at 106). If this Court is to avoid "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism * * *," *Garcetti* v. *Ceballos*, 547 U.S. 410, 423 (2006), it should again decline to expand *Flast*.

2. Since neither *Flast* nor a *Flast* analogue applies, this Court must apply standard principles of Article III standing. Under these principles, Respondents obviously lack standing. Their alleged injury is not "'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'" *Cuno*, 547 U.S. at 344 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Frothingham*, 262 U.S. at 488). Similarly, their alleged injury is not "'actual or imminent,' but instead 'conjectural or hypothetical.'" *Ibid.* (quoting *Lujan*, 504 U.S. at 560). The effects on the Arizona treasury of the success or failure of the redress they seek is the exactly the "sort of speculation" that Article III pretermits. *Ibid.* (citing *ASARCO* v. *Kadish*, 490 U.S. 605, 614 (1989) (op. of Kennedy, J.)).

Indeed, this Court has already held that these specific Respondents are "outsiders to the tax expenditure, 'third parties' whose own tax liability was not a relevant factor." *Levin* v. *Commerce Energy, Inc.*, 130 S. Ct. 2323, 2335 (2010) (citing *Hibbs* v. *Winn*, 542 U.S. 88 (2004)). The Court distinguished Respondents here—"the *Hibbs* plaintiffs"—from the *Levin* respondents, whose complaint was "that they are taxed differently from [others]." *Ibid.* "Unlike the *Hibbs* plaintiffs, respondents do object to their own tax situation, measured by the allegedly more favorable treatment accorded LDCs." *Ibid.* State taxpayers whose taxes will not change by virtue of their lawsuit are thus by definition "outsiders" or "third parties" bringing precisely the sort of "generalized grievances" forbidden by Article III. In short, Respondents claim no direct injury through personal

unequal treatment, but simply that the state treasury is being depleted.

Finally the nature of Respondents' challenge—a challenge to a tax credit—makes no difference. The logic of the Article III standard is "equally applicable to taxpayer challenges to expenditures that deplete the treasury, and to taxpayer challenges to so-called 'tax expenditures,' which reduce amounts available to the treasury by granting tax credits or exemptions." *Cuno*, 547 U.S. at 343-44. Thus, Respondents lack Article III standing under *Cuno*.

D. Recognizing the limits of state taxpayer standing will not undermine enforcement of the Establishment Clause.

Recognizing the proper limits of Article III standing will have little effect on the ability of plaintiffs to challenge Establishment Clause violations. Potential plaintiffs have numerous alternative avenues for redress.

1. First, the vast majority of Establishment Clause plaintiffs do not rely on state taxpayer standing at all. Most rely instead on allegations of unequal treatment or coercion. For example, nonreligious parties can challenge a law that benefits religious groups at their expense. See *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985). Any person can challenge a law that coerces him or her to engage in religious exercise. See *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). One religious group can challenge laws that prefer another. See *Larson* v. *Valente*, 456 U.S. 228 (1982). Students and their parents can challenge practices that unwillingly expose them to religion in

public schools. See *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *Stone* v. *Graham*, 449 U.S. 39 (1980); *Edwards* v. *Aguillard*, 483 U.S. 578 (1987). And even the tax credit at issue here could be challenged by a nonreligious STO, student, or donor who was placed at a disadvantage vis-à-vis a religious STO, student, or donor. None of these claims rely on state taxpayer standing.[6]

2. Second, in the few remaining cases where state taxpayer standing might be relevant, the same claims can typically be brought in state court. This Court has long recognized that state courts have jurisdiction to "determine cases at law or in equity, arising under the constitution or laws of the United States, or involving rights dependent upon such constitution or laws." *Robb* v. *Connolly*, 111 U.S. 624, 637 (1884); *cf. ASARCO*, 490 U.S. at 617 (op. of Kennedy, J., quoting U.S. Const., Art. VI, cl. 2) ("Inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that 'the Judges in every State shall be bound' by federal law"). And many states have far more lenient rules for taxpayer standing of all sorts. *Ibid.* at 617 (noting that Arizona permits state taxpayer standing in its courts). Indeed, the Plaintiffs in this case brought a federal challenge only after an identical challenge

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[6] Most claims based on unequal treatment or coercion can also be brought under the Free Exercise Clause. See *Larson*, 456 U.S. at 245 ("This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) (suggesting that the government neutrality requirements of the two Religion Clauses differ only in "formulation and emphasis").

with different plaintiffs was rejected by the Arizona Supreme Court and this Court denied certiorari. *Kotterman* v. *Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999).

As both *ASARCO* and *Kotterman* demonstrate, state taxpayer cases in state court can be appealed to this Court if needed to vindicate federal rights. Recognizing that state taxpayers do not have Article III standing means only that plaintiffs who rely only on their status as state taxpayers will not have the luxury of choosing between state and federal fora.

3. Third, state taxpayers can bring claims under parallel provisions of state constitutions, many of which are more stringent than the Establishment Clause. Linda S. Wendtland, *Note, Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 Va. L. Rev. 625, 631-34 (May 1985) (describing state Establishment Clause analogues).

These state constitutional provisions are in many ways an unexplored area of the law, since in many establishment-related lawsuits, state supreme courts have deferred to federal Establishment Clause standards. See, *e.g.*, *East Bay Asian Local Development Corp.* v. *State of California*, 13 P.3d 1122, 1139 (Cal. 2000) (recognizing lack of state precedent and deferring to federal standard); *Simmons-Harris* v. *Goff*, 711 N.E.2d 203, 211 (Ohio 1999) (same). Recognizing the limits to state taxpayer standing in federal court will allow state courts to develop their own law on state taxing and spending.

4. Finally, in accordance with principles of federalism and separation of powers, state taxpayers can

seek redress from the political branches of state government. Our system of government was not designed to have every important decision made in federal court, nor are judges the only ones bound by their office to follow the Constitution:

> It must be remembered that, even where parties have no standing to sue, members of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.

Hein, 551 U.S. at 618 (Kennedy, J., concurring).

Federalism and separation of powers concerns dictate that in some cases taxpayers seek redress not from the federal judiciary, but from their elected state or federal representatives. "[T]here is room for play in the joints" for state legislatures or Congress to meet anti-establishment concerns that do not fall within the ambit of the Establishment Clause. *Walz*, 397 U.S. at 669. Legislative remedies should therefore not be discounted in the context of the Establishment Clause any more than they are in the context of the Free Exercise Clause. *See Employment Div.* v. *Smith*, 494 U.S. 872, 890 (1990).

E. Recognizing the limits of state taxpayer standing serves important values of federalism and comity.

Comity between the state and federal governments will also be served by recognizing the limits on

Article III standing for state taxpayers. As *Cuno* pointed out, "State policymakers, no less than their federal counterparts, retain broad discretion to make 'policy decisions' concerning state spending 'in different ways * * * depending on their perceptions of wise state fiscal policy and myriad other circumstances.'" 550 U.S. at 346 (quoting *ASARCO*, 490 U.S. at 615 (op. of Kennedy, J.)). This Court has warned against setting up federal courts as monitors of state fiscal policy:

> [B]ecause state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as "virtually continuing monitors of the wisdom and soundness" of state fiscal administration, contrary to the more modest role Article III envisions for federal courts.

Ibid. (quoting *Allen* v. *Wright*, 468 U.S. 737, 760-61 (1984) (internal quotation omitted)).

Cuno's citation to *Allen* here is instructive. *Allen* held that it was unwise for the federal courts to act as continuing monitors of the federal Executive. See *Allen*, 468 U.S. at 760-61. *Cuno* extended this separation-of-powers idea to the federalism context, holding that federal courts should also avoid interpretations of Article III that involve continuous monitoring of *state* governmental activity. The same principles apply here: "In the Article III context," "concerns based on [federalism] 'counsel[] against recognizing standing in a case brought * * * to seek a restructur-

ing of the apparatus established by the [State government] to fulfill its legal duties.'" *Hein*, 551 U.S. at 617 (Kennedy, J., concurring) (quoting *Allen*, 468 U.S. at 761).

Indeed, as the Court pointed out last term, where "federal constitutional issues are likely to turn on questions of state tax law," the questions of state tax law "are more properly heard in the state courts." *Levin*, 130 S.Ct. at 2330 (quoting *Perez* v. *Ledesma*, 401 U.S. 82, 128, n.17 (1971) (opinion concurring in part and dissenting in part)). Thus federal courts ought to show "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Ibid.* (quoting *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U.S. 100, 112 (1981) (internal quotation omitted)).

In short, this Court has been reluctant to interfere with "the fiscal operations of the state governments," and it has studiously "refrain[ed] from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." *Ibid.* (quoting *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U.S. 276, 282 (1909) (alteration in original)). Here, as explained in Part I.D above, plaintiffs have ample means of preserving their interests under the Establishment Clause without recourse to state taxpayer standing. Thus, the interests of comity and federalism counsel against expanding *Flast* and authorizing more federal interference with state fiscal policy.

* * * * *

In the end, recognizing the limits of taxpayer standing merely places state taxpayers in the same situation with regard to the Establishment Clause that they are with regard to every other constitutional right—they must establish a concrete injury to press their claim in federal court, bring their claim in state court, or seek redress from the political branches.

II. The Ninth Circuit wrongly applied the endorsement test to a government funding case.

The Ninth Circuit's second departure from Establishment Clause jurisprudence was to apply the endorsement test to a case involving government funding—striking down the STO program on the ground that it "carries with it the *imprimatur* of government endorsement." *Winn*, 562 F.3d at 1005 (citing *Zelman*, 536 U.S. at 655). Not only has the Court never applied the endorsement test to a tax statute, it has never found endorsement in any government funding case, be it direct funding or indirect funding. There is a significant question as to whether the endorsement test remains a viable part of Establishment Clause doctrine. But to the extent it does, it should apply only to cases involving government expression.

A. The endorsement test is inherently subjective.

In many Establishment Clause cases, the endorsement "test" offers no principled basis for reaching a decision. See, *e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677, 691-92 (2005) (plurality opinion) (not applying the endorsement test); *id.* at 699-701 (Breyer, J., con-

curring) (same). The central problem with the endorsement test is its assumption that a government action conveys a single "message" that judges can objectively derive. As explained in *Capitol Square Review and Advisory Board* v. *Pinette*, the goal of the endorsement test is to identify "*the* 'objective' meaning of the [government's] statement in the community." 515 U.S. 753, 779 (1995) (O'Connor, J., concurring) (emphasis added). Although acknowledging that "[t]here is always *someone* who, with a particular quantum of knowledge, *reasonably* might perceive a particular action as an endorsement of religion," Justice O'Connor believed that this problem could be overcome by making the endorsement test a "collective standard" based on "a personification of a community ideal of reasonable behavior." *Id.* at 779-80 (second emphasis added).

The problem with this approach is that there are many cases where it is impossible to derive a single, objective meaning from a government's action. The endorsement test and its single-message assumption have been questioned on this basis ever since its inception. See, *e.g.*, *Salazar* v. *Buono*, 130 S.Ct. 1803, 1820 (2010) (plurality op.) (noting doubts about "workability of reasonable observer test").

Last year this Court squarely rejected the single-message assumption in a case involving a Ten Commandments display—*Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009). There, the Court emphasized that any given monument "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Id.* at 1135. Moreover, the Court noted that those involved in a particular government action—creators, donors, gov-

ernment—may *intend* to convey different messages, *id.* at 1136, and that the message conveyed by government action "may change over time." *Ibid.*

The single-message assumption has also been a point of frequent contention in Establishment Clause cases. In *Van Orden*, for example, Justice Breyer wrote that Ten Commandments monuments "can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message." *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring). Similarly, in *County of Allegheny*, Justice Kennedy criticized the majority's single-message approach, arguing that it forces the courts to "assume[ ] the difficult and inappropriate task of saying what every religious symbol means." *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 678 (1989) (Kennedy, J., dissenting in part and concurring in part); see also *Pinette*, 515 U.S. at 798 (Stevens, J., dissenting) ("[W]hile this unattended, freestanding wooden cross was unquestionably a religious symbol, [some] observers may well have received completely different messages from that symbol. Some might have perceived it as a message of love, others as a message of hate, still others as a message of exclusion * * * .").

Leading academics have also criticized the endorsement test as inherently subjective:

> Whether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no "neutral" position, outside the culture, from which to make this assessment.

> The bare concept of "endorsement" therefore * * * is nothing more than an application to the Religion Clauses of the principle: "I know it when I see it."

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 148 (1992).

Several scholars have drawn an analogy to race, arguing that just as a racially charged symbol may be interpreted differently depending on the observer's racial background, so too a religious symbol may be interpreted differently depending on the observer's attitude toward religion. See, *e.g.*, Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. Mich. J.L. Reform 247, 279-82 (2003) (collecting examples). Others have drawn on philosophers of language, arguing that there is no single objective meaning for a particular government act. See, *e.g.*, Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DePaul L. Rev. 53, 83-86 (1990); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 Md. L. Rev. 506, 554-56 (2001). But the conclusion has been the same: that the single message assumption of the endorsement test is wrong, and that it often "serves only to mask [the judiciary's] reliance on untutored intuition." McConnell, 59 U. Chi. L. Rev. at 151.

B. The endorsement test should not be applied to non-expressive government actions like taxation and spending.

The existing problems with the endorsement test are only magnified when it is stretched to cover gov-

ernment taxing and spending programs. There are two main reasons that "endorsement" is a category mistake when applied to government funding cases.

1. First, "endorsement" makes sense only if it applies to some expressive action by government. Endorsement is, after all, an expression of approval. But the government is not "saying something," much less a single something, every time it spends a dollar or levies a tax. Cf. *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550, 564-65 (2005) (disconnecting government speech program from targeted tax assessment that supported program). Given the difficulty of determining legislative intent, it would be that much harder to determine the single message the government is sending by making a particular appropriation or adding a particular deduction to the Internal Revenue Code. See, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter.")

The better view is that some government acts—proclamations, resolutions, declarations—constitute government expression, while other government acts, including fiscal acts, are not expressive. But without expressive content, there is no message to be sent, and no approval to be communicated. Taxing and spending are not, by themselves, communications of endorsement.

2. Second, even if endorsement could apply to non-expressive government action, there is no situation where a program of "true private choice" under *Zelman* would still constitute an unconstitutional

endorsement of religion. The endorsement test is thus redundant in the funding context.[7]

In the present case, Section 1089 passes muster under the Establishment Clause because it fulfills all three of the criteria used in *Zelman*. First, it is facially neutral toward religion, as it offers a tax credit for contributions to STOs regardless of whether the STO provides tuition for religious or non-religious schools. *Winn* v. *Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 660 (9th Cir. 2009) (O'Scannlain, J., dissenting from denial of rehearing en banc). Second, the tax credits are available to a broad class of citizens, as any taxpayer wishing to contribute to an STO is eligible for the tax credit. *Id.* at 659. And third, the decision to direct money to an STO that funds religious versus secular schools belongs entirely to the taxpayer—aid reaches religious schools only as a result of the "genuine and independent choices of private individuals." *Zelman*, U.S. 536 at 649; see also Brief of Arizona at 30-35. Thus, Section 1089 easily passes muster under *Zelman*.

Having satisfied the standard in *Zelman*, Arizona's STO program cannot then be found to violate the endorsement test. In fact, the endorsement test could become relevant here only if the private choices of private citizens regarding which STO they would

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[7] Though not before the Court in this appeal, a program of direct aid that succeeds under this Court's direct aid jurisprudence will also succeed under the endorsement test. See *Agostini*, 521 U.S. at 235 ("The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion."). Thus, endorsement is a redundant inquiry in any funding case.

like to support were to somehow be conflated with, or mistaken for, government endorsement.

But this Court has repeatedly rejected the idea that private choices can be mistaken for government endorsement, noting that such a "transferred endorsement" principle would wreak havoc on policymakers. *Pinette*, 515 U.S. at 767-68 (plurality op.); see also *Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990) (noting the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect"). If forced to account for potential misperceptions, "[e]very proposed act of private, religious expression in a public forum would force officials to weigh a host of imponderables * * * . If the State guessed wrong in one direction, it would be guilty of an Establishment Clause violation; if in the other, it would be liable for suppressing free exercise or free speech." *Pinette*, 515 U.S. at 768. A "transferred endorsement" test would also disrupt settled establishment jurisprudence by invalidating policies that provide merely incidental benefits to religion. *Ibid.* Thus, the State should be held accountable only for "its *own* expression." *Ibid.*

The same is true in funding cases involving true private choice. Here, for example, private choices may result in a majority of government funds benefiting students enrolled at religiously affiliated schools—as was the case in *Mueller* and *Zelman*. But "the constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or

most recipients choose to use the aid at a religious school." *Zelman*, 536 U.S. at 658. If it were otherwise, courts could invalidate neutral government aid programs based on the idea that governments should predict how private individuals might use the aid and how a reasonable observer might perceive those private choices. *Pinette*, 515 U.S. at 767 (rejecting the notion that "school districts [should] guess whether some undetermined critical mass of the community might nonetheless perceive the district to be advocating a religious viewpoint"). Furthermore, because communal perceptions can change over time, it is impossible for legislators to predict whether government taxing and spending programs will be perceived as an endorsement of religion at various points in the future.

3. For these reasons, it is no surprise that this Court has *never* applied the endorsement test to invalidate a government funding decision. In the six cases decided since *Lynch* v. *Donnelly* in which a controlling majority of the Court has found endorsement, the challenged practice has been government speech, never government funding itself. See *Wallace*, 472 U.S. at 59-60; *Ball*, 473 U.S. at 392; *Edwards*, 482 U.S. at 593; *Allegheny*, 492 U.S. at 599; *Santa Fe*, 530 U.S. at 308; *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 866 (2005). Whether it be government school curricula (*Ball*, *Edwards*), government displays (*Allegheny*, *McCreary*), or government-run ceremonies (*Wallace*, *Santa Fe*), the act of endorsement is always an expressive act.

This definition of endorsement as government expression is borne out by the fact that in all but one of these cases, the Court referred to a "message" of en-

dorsement that the government actor expressed. See *Wallace*, 472 U.S. at 61; *Ball*, 473 U.S. at 389; *Allegheny*, 492 U.S. at 598, 599; *Santa Fe*, 530 U.S. at 309-310; *McCreary*, 545 U.S. at 869; *cf. Edwards*, 482 U.S. at 593 ("religious view" inserted into curriculum)

To be sure, the Court has evaluated endorsement in some government funding cases, but it has never found endorsement in a funding case. See, *e.g.*, *Zelman*, 536 U.S. at 655 (finding no "imprimatur"); *Mueller*, 463 U.S. at 399 (same); *cf. Widmar* v. *Vincent*, 454 U.S. 263, 276 n.12 (1981) ("an open forum in a public university does not confer any imprimatur of state approval").

There is therefore no precedent for what the Ninth Circuit did here—find endorsement in a case involving government funding. Should it reach the issue, the Court should reject this approach.

III. The Ninth Circuit wrongly imported a disparate impact rule into Establishment Clause analysis.

Perhaps the most reckless of the Ninth Circuit's errors was its holding that the STO program was constitutionally suspect because it resulted in "disproportionate funding" or a "disparity" in funding for religious schools. See *Winn*, 562 F.3d at 1013 (STO program "channels a *disproportionate* amount of government aid to sectarian STOs"); *id.* at 1017 ("*disproportionate* amount of the program aid is earmarked for use at religious schools"); see also *Winn*, 586 F.3d at 653 (Reinhardt, D.W. Nelson, Reinhardt, and Fisher, JJ., panel judges concurring in denial of rehearing en banc) (STO program "has created an

overwhelming *disparity* in the number of scholarships exclusively available for use at religious schools compared to the number available for use at secular schools"); *id.* at 657 (analyzing whether STO program would "result in *disproportionate funding* being made available only for use at religious institutions") (emphases added). This analysis effectively injects a disparate impact rule into Establishment Clause jurisprudence—an unprecedented approach that has drastic consequences.

1. This Court has never held that mere disparate impact suffices to prove an Establishment Clause violation; it has always required unequal treatment. In *Larson* v. *Valente*, for example, a religious group challenged registration and reporting requirements that affected some religious organizations but not others. The state defended on the ground that the law created only a disparate impact and was therefore constitutional under *McGowan* v. *Maryland*, 366 U.S. 420 (1961) and *Everson*. *Larson*, 456 U.S. at 246 n.23. This Court rejected the state's defense, but not on the ground that disparate impact could prove an Establishment Clause claim. Instead, it held that the law was unconstitutional because it was "not simply a facially neutral statute [that] * * * happen[ed] to have a 'disparate impact' upon different religious organizations"; it was a law that "ma[de] explicit and deliberate distinctions between religious organizations." *Ibid.*

Similarly, in *Hernandez* v. *Commissioner*, the Court held that even where there is a "disparate burden," a law "does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.'"

490 U.S. 680, 696 (1989) (quoting *McGowan*, 366 U.S. at 442). And in *Mueller* v. *Allen*, the Court said "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U.S. 388, 401 (1983). This even though more than 95% of the students participating in the *Mueller* program attended private religious schools. *Id.* at 391. See also *Zelman*, 536 U.S. at 658-660.

2. The disparate impact rule adopted by the Ninth Circuit would have a drastic impact on taxation at the federal, state, and local levels. Allowing disparate impact claims would force government bodies to evaluate whether every action they take might result in differential outcomes among religious groups, or between religious people and the non-religious. The impact could be thought of as a set of concentric circles, with those provisions most likely to be affected by the Ninth Circuit's rule in the middle, surrounded by ever-widening sets of tax credits, deductions, and exemptions.

In the inner circle would be similar tax credit programs in other states. For example, Florida has a tax credit program very similar to Arizona's. See Fla. Stat. §§ 220.1875, 1002.395 (2010); App.26a. As of the first quarter of 2010, 83.5% of the student-beneficiaries of Florida's tax credit program attended religious schools and 79.5% of the recipient schools were religious. See Florida Department of Education, Florida Tax Credit Scholarship Program: February Quarterly Report 2010 at 5 (2010). That percentage is very close to the 85% of STO funding that went to

students attending Arizona religious schools. *Winn*, 562 F.3d at 1017.

Georgia enacted a similar program in 2008. See Ga. Code Ann. §§ 20-2A-1 *et seq.*; 48-7-29.16; App.27a-28a. As of October 2009, there were twenty-five student scholarship organizations; of the ten that maintain detailed information on their websites regarding partner schools, eight partner with religious schools and four do so exclusively. See Center for an Educated Georgia, Tuition Tax Credit Scholarship Program, http://www.educatedgeorgia.org/forschools-q10007-Tuition_Tax_Credit_Scholarship_Program_HB_1133.aspx (last visited June 21, 2010).

Similar programs exist in Indiana, Iowa, Pennsylvania, and Rhode Island. See Ind. Code Ann. § 6-3.1-30.5-1 *et seq.*, App.35a; Iowa Code § 422.11S, App. 36a; 72 Pa. Cons. Stat. § 8705-F *et seq.*, App.92a; R.I. Gen. Laws § 44-62-1 *et seq.*; App.94a.

But there is no real reason, given the logic of the Ninth Circuit's disparate impact rule, to stop at directly analogous tuition tax credit programs. In the second circle of affected tax laws would be the federal charitable tax deduction, state tax exemptions, and the like.

The federal tax deduction for charitable contributions would be subject to challenge under any disparate impact rule. It covers gifts and contributions made to institutions "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes." 26 U.S.C. § 170(a)(1), (c)(2)(B). Under the Ninth Circuit's approach, courts would have to determine whether religious charitable

organizations receive a "disproportionate" number of these gifts.

In 2009, one subset of religious organizations—houses of worship and church organizing bodies—received a projected 33%, or $100.95 billion, of all private giving whereas the education sector (the second largest recipient sector) received 13%, or $40.01 billion. Giving USA 2010: Executive Summary 12-13 (2010), *available at* www.givingusa2010.org/freeform.php. Additionally, from 1966 through and including 1996, houses of worship and church organizing bodies received over 40% of private giving and from 1983 through 1988, over 50%. Kennard T. Wing *et al.*, The Nonprofit Almanac 2008 74-75 tbl.3.2 (2008). While data to this effect is not available, when all religious institutions (including private religious schools, hospitals, and other "parachurch" organizations) are considered together, donations to religious organizations very likely represent the significant majority of all charitable donations under Section 170.

Other tax provisions likely to be the subject of disparate impact litigation under the Establishment Clause would be the federal charitable tax exemption provided for under 26 U.S.C. § 501(c)(3), and analogous exemptions from state income and property taxes. See *Walz*, 397 U.S. at 676-77 ("[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise * * * benevolent neutrality toward churches and religious exercise generally" through charitable tax exemptions). It could easily be argued that these exemp-

tions "disproportionately" benefit religious organizations.

The Ninth Circuit's disparate impact rule has already had an unfortunate effect on this sort of tax exemption. A California federal district court, relying heavily upon the Ninth Circuit's decision in this case, recently denied a motion to dismiss a challenge to the parsonage exemption provided for in 26 U.S.C. § 107. See *Freedom From Religion Foundation, Inc.* v. *Geithner*, No. Civ. 2:09-2894, 2010 WL 2089339 (E.D. Cal. May 21, 2010).

The outer circle of affected tax laws is far broader, and includes hundreds of statutes that provide for federal and state tax credits, tax deductions, and tax exemptions that would be affected by the Ninth Circuit's disparate impact rule. The Appendix to this brief is offered to provide the Court with some idea of the scope of the outer circle. The list is meant to be as comprehensive as possible, but doubtless omits many provisions, including all tax provisions enacted by municipalities.

All of these provisions are implicated to a greater or lesser degree by the logic of the Ninth Circuit's disparate impact rule. If the rule is allowed to stand, every one of these provisions could spark an Establishment Clause lawsuit. Such an outcome should be prevented, as it would "promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

* * * * *

The Ninth Circuit's decision in this case includes three unwarranted departures from existing Estab-

lishment Clause jurisprudence: creating a state taxpayer analogue to the *Flast* exception, applying the endorsement test to state funding decisions, and importing disparate impact analysis into the Establishment Clause context. Each is not only unsound but would further muddle an already confused area of the law. This Court should reject all three.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's ruling should be reversed, and the case dismissed for lack of standing or, in the alternative, failure to state a claim upon which relief may be granted.

Respectfully submitted,

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Appendix

A Partial List of Tax Statutes Potentially Implicated by *ACSTO v. Winn* and *Garriott v. Winn*

Statute	Description
United States	
26 U.S.C. § 21	providing for a credit against income taxation for expenses for household and dependent care services, including care rendered in churches and by religious organizations
26 U.S.C. § 79	exempting church plans (defined by 26 U.S.C. § 414(e)) from the general rule that the value of employer provided group life insurance plans are taxable income to the employee
26 U.S.C. § 107	excluding from income taxation the rental value of a home provided, or the rental allowance for housing provided, as remuneration to clergy
26 U.S.C. § 117	exclusion from income for qualified tuition scholarships, including for religious seminary students and students studying to become members of the clergy
26 U.S.C. § 119	excluding from income taxation the value of meals and lodging furnished to an employee, including kosher meals for rabbis and paid rabbinical fellows, meals fed to employees in church sponsored soup kitchens, and

Statute	Description
	meals and lodging in church facility and in off-site locations
26 U.S.C. § 129	excluding from income taxation payments by an employer for dependent care assistance, including for care by religious provider in a religious facility
26 U.S.C. § 132	excluding from income taxation the value of certain employee fringe benefits, including reduced tuition expenses for teachers at private religious schools and certain other fringe benefits provided by religious employers
26 U.S.C. § 162	deducting from the calculation of income tax the value of trade and business expenses including expenses for developing and operating religious businesses (if not described by 26 U.S.C. § 170 (relating to deductible charitable contributions))
26 U.S.C. § 170	deducting from the calculation of income tax charitable contributions to religious, educational, and other charitable organizations
26 U.S.C. § 213	deducting from the calculation of income tax the value of certain medical and dental expenses, which might include expenses for spiritual healing performed by clergy

Statute	Description
	members (if not described by 26 U.S.C. § 170 (relating to deductible charitable contributions))
26 U.S.C. § 265(a)(6)(B)	deducting from the calculation of income tax the mortgage interest and real property tax paid on parsonages described by 26 U.S.C. § 107
26 U.S.C. §§ 410(c), 410(d), 411(e), 412(e), 415(c)(7)	giving churches the option of exempting church plans (defined by 26 U.S.C. § 414(e)) from some of the requirements of qualified employee trusts (which are subject to favorable tax rules under 26 U.S.C. § 401)
26 U.S.C. § 501(c)(3)	exempting from income taxation religious, educational, and other charitable organizations
26 U.S.C. § 501(c)(10)	exempting from income taxation domestic fraternal societies, the net earnings of which are devoted exclusively to religious, educational, and other charitable organizations
26 U.S.C. § 529	exempting from income taxation qualified tuition programs that permit taxpayers to purchase "tuition credits" for the higher education tuition expenses of a beneficiary, including for students in qualified religious schools and seminaries

Statute	Description
26 U.S.C. § 530	exempting from income taxation Coverdell education savings accounts (trusts to pay the qualified higher education expenses of a beneficiary)
26 U.S.C. § 642(c)	deducting from the calculation of estate and trust income tax the revenue earned from assets set aside for charitable purposes (defined by 26 U.S.C. § 170(c)), including set-asides for religious purposes and to benefit religious organizations
26 U.S.C. § 664	exempting from income taxation charitable remainder trusts, the remainder of which, at the expiration of the trust, passes to an organization described by 26 U.S.C. § 170(c) (which includes religious organizations)
26 U.S.C. §§ 2053(d), 2055	deducting from the calculation of estate tax the value of the portion of an estate given to a corporation organized and operated exclusively for religious or other charitable purposes
26 U.S.C. §§ 2053(d), 2106(a)	the corollary to 26 U.S.C. § 2055 for non-residents who are not citizens of the United States
26 U.S.C. § 2522	deducting from the calculation of gift tax the value of gifts given to religious and other charitable

Statute	Description
	organizations
26 U.S.C. § 3121(b)(8), (i)(4)	exempting from income for purposes of FICA taxation compensation for certain services performed by ministers and members of a religious order for duties required by that order, for services performed under the employ of a church if the church elects not to be subject to FICA taxation under 26 U.S.C. § 3121(w), and for remuneration for the value of room, board, clothing and other specified perquisites
26 U.S.C. § 3306	excluding from the definition of "employment," for the purpose of calculating federal unemployment tax imposed on employers, services performed in the employ of an organization described by 26 U.S.C. 501(c)(3), which includes religious organizations
26 U.S.C. § 3401(a)(9)	exempting from federal income tax withholding wages earned by a minister in the exercise of his ministry or by a member of a religious order in the exercise of the duties of that order
26 U.S.C. § 4947	exempting from income taxation certain trusts not described by 26 U.S.C. § 501(c)(3) but devoted to the purposes described by 26 U.S.C. § 170(c)(2)(B) (which includes religious

Statute	Description
	purposes)
26 U.S.C. §§ 4980B(d), 4980D(b)(3)(C), 980F(f)(2)	exempting church plans (defined by 26 U.S.C. § 414(e)) from excise taxation imposed on group healthcare insurance plans for failing to meet certain requirements generally imposed on group healthcare insurance plans
26 U.S.C. § 6115	exempting charitable organizations described by 26 U.S.C. § 170(c) (which includes religious organizations) from the requirement to disclose to a donor the value of goods received in exchange for a quid pro quo donation when the donation is in exchange for an intangible religious benefit (thus rendering such donations more easily deductible)
29 U.S.C. §§ 1003, 1321	exempting church plans (defined for some purposes as a plan established by a church or a collection of churches that is exempt from tax under 26 U.S.C. § 501 and defined for other purposes as plans described by 26 U.S.C. § 414(e)) from some of the requirements of ERISA
ALABAMA	
ALA. CODE § 40-8-1(d)	exempting from property taxation all real and personal property devoted to religious, educational, and other

Statute	Description
	charitable organizations
ALA. CODE § 40-9-1(1), (6)	exempting from property taxation all real and personal property used exclusively for religious worship, schools, libraries of ministers, and all religious books kept for sale by ministers
ALA. CODE § 40-9-12	exempting from license and excise taxation many individual organizations, including certain religious organizations
ALA. CODE § 40-12-82	exempting from license taxation on certain public entertainment such entertainment exclusively for religious, educational, or other charitable purposes
ALA. CODE § 40-14-40	exempting from franchise taxation religious, educational, and benevolent corporations
ALA. CODE § 40-14A-43	exempting from excise taxation on business all organizations described by 26 U.S.C. § 501(a) (which includes religious organizations), and certain other organizations operated for religious purposes
ALA. CODE § 40-15B-2	deducting from the calculation of estate tax the value of any interest in the estate that qualifies as a charitable deduction (which includes property set aside for religious uses)
ALA. CODE §	deducting from the calculation of

Statute	Description
40-16-1(6)	excise tax on financial institutions all donations made by such financial institutions to religious, educational, and other charitable institutions
ALA. CODE § 40-18-2.1	exempting from income taxation all income earned from missionary service in a foreign country for at least 24 months at the direction of a church or religious organization
ALA. CODE § 40-18-15(a)(10)	deducting from the calculation of income tax the value of charitable donations described by 26 U.S.C. § 170 (which includes donations to religious organizations)
ALA. CODE § 40-18-25.1	exempting from income taxation trusts described by 26 U.S.C. § 501 (which includes religious organizations)
ALA. CODE § 40-18-32	exempting from corporate income taxation organizations described by 26 U.S.C. § 501(a) (which includes religious organizations)
ALA. CODE § 40-18-33	deducting from the calculation of income tax all federal deductions, including the deduction provided by 26 U.S.C. § 170 for donations to religious and other charitable organizations
ALA. CODE § 40-22-5.1	exempting from recordation tax any deed or similar instrument executed for the purpose of carrying out the

Statute	Description
	division of any church or religious organization or for the merger of such organizations
ALA. CODE § 40-23-62(20)	exempting from use taxation the storage or consumption of religious magazines and publications, including when distributed in Bible classes or by religious organizations
ALASKA	
ALASKA STAT. § 29.45.030 (a)(3), (b)	exempting from property taxation property used exclusively for religious, educational, or other charitable purposes, including the residence of certain religious educators and the physical structure and furniture of places of worship
ALASKA STAT. § 43.40.100 (2)(E)	exempting from excise taxation on motor fuel such fuel used by charitable institutions
ALASKA STAT. § 43.20.014	providing for a credit against income taxation for contributions to private accredited colleges for educational purposes
ALASKA STAT. § 43.20.036(j)	deducting from the calculation of income tax certain contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
ALASKA STAT. § 43.56.018	providing for a credit against property taxation for contributions to private accredited colleges for

Statute	Description
	educational purposes
ARIZONA	
ARIZ. REV. STAT. ANN. § 42-5069(C)(10)	exempting from excise taxation the leasing or renting of real property for the purpose of religious worship by charitable organizations described by 26 U.S.C. § 501(c)(3)
ARIZ. REV. STAT. ANN. § 42-5073(A)(1)	exempting from excise taxation the activities or projects of bona fide religious or educational institutions
ARIZ. REV. STAT. ANN. § 42-5159 (A)(13)(f), (j), (l)	exempting from use taxation tangible property purchased by a nonprofit organization described by 26 U.S.C § 501(c)(3) (which includes religious organizations) that uses such property to assist the physically or mentally handicapped, for job training and placement, that severs meals to the needy at no cost, or that provides low-income rental housing for the elderly
ARIZ. REV. STAT. ANN. § 42-5159(A)(15)(a), (A)(32), (A)(49)	exempting from use taxation tangible property sold by nonprofit charitable organizations described by 26 U.S.C. § 501(c)(3), motor vehicles that are provided to charitable or educational institutions described by 26 U.S.C. § 501(c)(3), and prepared food donated by a restaurant to a nonprofit charitable organization described by

Statute	Description
	26 U.S.C. § 501(c)(3) that regularly serves meals to the needy
ARIZ. REV. STAT. ANN. § 42-11109	exempting from property taxation property used primarily for religious worship
ARIZ. REV. STAT. ANN. § 42-11121	exempting from property taxation "community service organizations," defined in part with reference to 26 U.S.C. § 501(c)(3) dedicated to providing community services, which include youth programming, child care, counseling, training, and disaster relief (including such organizations operated by religious entities)
ARIZ. REV. STAT. ANN. § 42-11129	exempting from property taxation property owned by a fraternal society described by 26 U.S.C. § 501(c)(8) if the earnings of such organization are devoted to religious, educational, or other charitable purposes, or by 26 U.S.C. § 501(c)(10) (limited by definition to organizations the net earnings of which are devoted to religious, educational, or other charitable organizations)
ARIZ. REV. STAT. ANN. § 42-11132(B)	exempting from property taxation property owned by religious, educational, or other charitable institutions leased to nonprofit educational organizations to be used

Statute	Description
	for elementary or secondary educational instruction
ARIZ. REV. STAT. ANN. § 43-1088	providing for a credit against income taxation for certain charitable donations to qualifying organizations, defined with reference to 26 U.S.C. § 501(c)(3) (which includes religious organizations)
ARIZ. REV. STAT. ANN. § 43-1089	providing for a credit against income taxation for contributions to school tuition organizations, defined with reference to 26 U.S.C. § 501(c)(3) (which includes religious organizations)
ARIZ. REV. STAT. ANN. § 43-1201	exempting from income tax religious, educational, other charitable corporations, and other organizations described by 26 U.S.C. § 501
ARIZ. REV. STAT. ANN. § 43-1215	exempting from income taxation religious organizations (other than religious trusts), certain educational organizations, and organizations principally controlled by religious organizations
ARKANSAS	
ARK. CODE ANN. § 21-13-111(a)(2)	deducting from the calculation of income tax certain expenses incurred by volunteers of charitable organizations (including religious organizations) in connection with

Statute	Description
	their volunteer work
ARK. CODE ANN. § 26-3-301(7), (12)	exempting from property taxation all buildings belonging to institutions of "purely public charity," all church property (including administrative buildings and parsonages), and certain land associated with both
ARK. CODE ANN. § 26-3-303	exempting from property taxation parsonages owned by churches for use as ministerial residences
ARK. CODE ANN. § 26-51-303(9)	exempting from income taxation religious, educational, and other charitable organizations
ARK. CODE ANN. § 26-51-419	deducting from the calculation of income tax the value of charitable donations described by 26 U.S.C. § 170 (which includes donations to religious organizations)
ARK. CODE ANN. § 26-51-502	providing for a credit against income taxation for the expense of dependent care, defined with reference to 26 U.S.C. § 21 (which applies equally to child care rendered by churches)
ARK. CODE ANN. § 26-51-508	providing for a credit against income taxation for the expenses associated with operating a child care facility described by ARK. CODE ANN. § 26-52-516 (which might include facilities operated by church and religious organizations)

Statute	Description
ARK. CODE ANN. § 26-51-902(13)(D)	excluding from the definition of "wages" for income tax withholding purposes the remuneration paid for the services of a minister in the exercise of his ministry or the members of a religious order in the satisfaction of the duties of that order
ARK. CODE ANN. § 26-52-401(1), (2), (4), (14)	exempting from excise taxation on gross receipts certain receipts from sales of personal property or services by churches or other charitable organizations, newspapers and certain other repeating publications
ARK. CODE ANN. § 26-52-413	exempting from excise taxation on gross receipts the receipts from sales to orphans' homes and children's homes that are operated by a church, religious organization, or other benevolent charitable association
ARK. CODE ANN. § 26-52-516	providing for a credit against excise taxation on gross receipts in the form of an *ex post* cash refund receipts from the operation of certain licensed child care facilities, even if the facility is operated by a church or religious organization
ARK. CODE ANN. § 26-59-108	exempting from estate taxation bequests made to any religious, educational, or other charitable

Statute	Description
	institution
ARK. CODE ANN. § 26-63-403	exempting from excise taxation on tourism the gross receipts or proceeds derived from the not-for-profit sale or rental of tangible property or services (but excluding revenue from admissions to tourist attractions)
CALIFORNIA	
CAL. REV. & TAX. CODE § 62(k)	excluding from the definition of "change in ownership," and thus from property transfer taxation, any transfer of property or an interest between certain corporations, including religious corporations
CAL. REV. & TAX. CODE §§ 206, 206.1, 207, 207.1	exempting from property taxation all churches, all buildings and land used exclusively for religious worship, certain other property owned by or leased to a church, and certain real property necessary for the parking of automobiles of people attending religious services
CAL. REV. & TAX. CODE § 213	exempting from property taxation certain property brought into the state exclusively from religious, educational, or other charitable purposes
CAL. REV. & TAX. CODE §§ 214, 214.1	exempting from property taxation certain property used exclusively for religious, educational, or other

Statute	Description
	charitable purposes
CAL. REV. & TAX. CODE § 6362.8	exempting from sales taxation receipts from the sale of any component parts of a publication issued by an organization described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
CAL. REV. & TAX. CODE §§ 6363, 6363.5	exempting from sales taxation receipts from the sale of food served to private school students and meals served by any religious organization at a gathering conducted under its auspices
CAL. REV. & TAX. CODE § 6375	exempting from sales taxation receipts from the sale and consumption of tangible property made by organizations described by CAL. REV. & TAX. CODE § 214 and dedicated to the relief of poverty
CAL. REV. & TAX. CODE § 6375.5	exempting from sales taxation receipts from the sale of children's clothing to nonprofit organizations described by CAL. REV. & TAX. CODE § 23701d (which includes religious organizations) to be distributed for free to children
CAL. REV. & TAX. CODE §§ 6408, 6409	exempting from use taxation the storage or consumption of medical health literature or health safety education materials by certain organizations described by CAL. REV.

Statute	Description
	& TAX. CODE § 214 and engaged in the dissemination of medical or health safety information
CAL. REV. & TAX. CODE § 7284.1	exempting from local taxation any minister of any religious organization described by 26 U.S.C. § 501(c)(3)
CAL. REV. & TAX. CODE § 17073	deducting from the calculation of income tax most federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious institutions)
CAL. REV. & TAX. CODE § 17280(d)	deducting from the calculation of income tax mortgage interest payments and real property taxes paid on parsonages described by 26 U.S.C. § 107
CAL. REV. & TAX. CODE § 23701d	exempting from corporate income taxation religious, educational, or other charitable organizations
CAL. REV. & TAX. CODE § 23741	exempting from income taxation specifically applicable to other otherwise tax exempt organizations the rental income received by an exempt church (such as one described by CAL. REV. & TAX. CODE § 23701d) from another exempt church
CAL. REV. &	deducting from the calculation of

Statute	Description
TAX. CODE §§ 24357, 24359(b)	corporate income tax the value of charitable contributions to religious, educational, or other charitable organizations
COLORADO	
COLO. REV. STAT. §§ 39-3-106, 39-3-106.5, 39-3-116	exempting from property taxation real and personal property owned and used for religious worship and other religious purposes
COLO. REV. STAT. §§ 39-3-107, 39-3-116	exempting from property taxation real and personal property owned and used for nonprofit schools
COLO. REV. STAT. §§ 39-3-109, 39-3-116	exempting from property taxation real and personal property owned and used for charitable purposes if such property is residential and used as part of a church, school, or other exempt organization
COLO. REV. STAT. §§ 39-3-112, 39-3-116	exempting from property taxation real and personal property owned and used by charitable organizations irrevocably dedicated to religious or other charitable purposes if such property is residential and used as an orphanage, home for the aged, family service facility for single-parent families, low-income households
COLO. REV. STAT. § 39-22-	deducting from the calculation of income tax all federal itemized

Statute	Description
104	deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
COLO. REV. STAT. § 39-22-301	providing for a credit against corporate income taxation for certain crop or livestock contributions to organizations exempt from taxation under the Internal Revenue Code (including religious organizations described by 26 U.S.C. § 501(c)(3))
COLO. REV. STAT. §§ 39-26-705, 39-26-708, 39-26-718	exempting from sales and use taxation the consumption of ink and newsprint (even if used for religious publications), the use of goods donated by their manufacturer to an organization described by 26 U.S.C. § 501(c)(3) (which includes religious organizations), all sales of construction and building materials to improve land and buildings owned and used by charitable organizations in their charitable functions, all sales to charitable organizations in the conduct of their charitable functions, and occasional sales by charitable organizations
CONNECTICUT	
CONN. GEN. STAT. § 12-81(7), (8), (9),	exempting from property taxation property used for educational or other charitable purposes, the funds

Statute	Description
(12)-(15), (58)	and estate of certain colleges (including religious colleges), property loaned without charge to tax-exempt educational institutions or to any religious or other tax-exempt charitable organization, personal property of religious organizations if its principal or income is used for religious or other charitable purposes, houses of worship and the land they sit on and certain internal furniture, real property and equipment owned or held by religious organizations and used as a school or for certain other purposes, and certain parsonages
CONN. GEN. STAT. § 12-347	exempting from transfer taxation transfers of property to religious, educational, or other charitable organizations
CONN. GEN. STAT. §§ 12-407(a)(17), 12-408, 12-411	exempting from sales and use taxation on lodging houses certain religious and other charitable homes for the aged or ill, summer camps for children operated by religious and other charitable organizations, lodging accommodations at educational institutions, and lodging accommodations operated by a nonprofit organization exempt from tax under 26 U.S.C. § 501(a) (which includes religious organizations)

Statute	Description
CONN. GEN. STAT. § 12-412(5), (8), (9), (109), (114)	exempting from sales and use taxation sales of tangible property by or to any organization described by 26 U.S.C. § 501(c)(3) (which includes religious organizations), food products sold in student cafeterias and other locations maintained in a private or private religious school or college, college textbooks and magazines and newspapers
CONN. GEN. STAT. § 12-543	exempting from excise taxation on club dues such dues or fees paid to clubs sponsored and controlled by religious and other charitable organizations
CONN. GEN. STAT. § 12-701a	providing for a credit against income taxation for contributions to qualified tuition programs described by 26 U.S.C. § 529(b) that permit taxpayers to purchase "tuition credits" for the higher education tuition expenses of a beneficiary, including for students in qualified religious schools and seminaries
CONN. GEN. STAT. § 12-710	exempting from income taxation organizations described by 26 U.S.C. § 501(c) (which includes religious organization) and other entities exempt from federal income tax

Statute	Description
DELAWARE	
DEL. CODE ANN. tit. 8, § 501	exempting from corporate franchise taxation religious, educational, or purely charitable associations and certain tax exempt organizations (defined with reference to 26 U.S.C. § 501(c)(3) (which includes religious organizations)
DEL. CODE ANN. tit. 9, §§ 8105, 8106	exempting from property taxation certain property owned by churches or religious societies, colleges or schools, and certain other charitable corporations
DEL. CODE ANN. tit. 9, § 8151	exempting from property taxation land and improvements held by churches, religious societies, and other charitable corporations to provide nonprofit housing for the elderly
DEL. CODE ANN. tit. 30, § 1109	deducting from the calculation of income tax most federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170
DEL. CODE ANN. tit. 30, § 1507	exempting from a lien imposed on the gross estate of a resident decedent for the purposes of estate taxation any property for which a charitable deduction was permitted under 26 U.S.C. § 2055 (which

Statute	Description
	includes estate interests dedicated to religious organizations)
DEL. CODE ANN. tit. 30, § 1902(b)(2)	exempting from corporate income taxation religious, educational, and other charitable corporations or trusts
DEL. CODE ANN. tit. 30, § 2115	exempting from license taxation on places of amusement such organizations that devote all profits to religious, charitable, or philanthropic purposes
DEL. CODE ANN. tit. 30, § 5401(1)(q)	exempting from realty transfer taxation certain conveyances to religious organizations
DEL. CODE ANN. tit. 30, § 6101	exempting from excise taxation on hotel lodging "hotels" operated by religious, educational, other charitable organizations, and summer camps
FLORIDA	
FLA. STAT. § 196.192	exempting from property taxation all property owned by tax exempt entities if used for tax exempt purposes
FLA. STAT. § 196.196	exempting from property taxation property used for religious, including for public worship, or other charitable purposes, property owned by an organization described by 26 U.S.C. § 501(c)(3) that intends to use such property for low income

Statute	Description
	housing
FLA. STAT. § 196.1961	exempting from property taxation certain historic property
FLA. STAT. § 196.1975	exempting from property taxation certain nonprofit homes for the aged overseen by an organization described by 26 U.S.C. § 501(c)(3) (which includes religious organizations), particularly exempting the portions of such homes used for religious services
FLA. STAT. § 196.1986	exempting from property taxation community centers owned by nonprofit organizations and used for religious, educational, or other charitable purposes
FLA. STAT. § 196.1987	exempting from property taxation property owned by an organization described by 26 U.S.C. § 501(c)(3) and used to exhibit, illustrate, and interpret Biblical manuscripts and other Biblical archives
FLA. STAT. § 196.199(2)(c)	exempting from property taxation governmental property leased to an organization that uses the property exclusively for religious or other charitable purposes
FLA. STAT. § 199.183(2)	exempting from intangible property taxation such intangible personal property owned by certain nonprofit religious, educational (including

Statute	Description
	religious schools), or other charitable institutions (defined with reference to 26 U.S.C. § 501(c)(3) (which includes religious institutions))
FLA. STAT. § 202.125(4)	exempting from excise taxation on the sale of communications services such sales to homes for the aged, religious institutions, or educational institutions (including religious schools) described by 26 U.S.C. § 501(c)(3)
FLA. STAT. §§ 205.022, 205.191, 205.192	exempting from local license taxation the religious, educational, or charitable functions or occasional fundraising projects of nonprofit religious, educational, or charitable institutions, or for practicing the tenets of any church
FLA. STAT. § 212.06(9)	exempting from sales and use taxation the use, sale, or distribution of religious publications, Bibles, certain other religious books and equipment that is part of prayer services
FLA. STAT. § 212.08(5)(m), (7)(k), (m), (p), (r)	exempting from sales and use taxation educational materials purchased by certain licensed child care facilities, the sale of meals provided by nonprofit organizations to handicapped, elderly, or indigent persons, sales or leases directly to religious institutions (including

Statute	Description
	certain non-church organizations described by 26 U.S.C. § 501(c)(3)) when carrying out their religious activities, sales or leases to other organizations described by 26 U.S.C. § 501(c)(3), sales of school books, certain other publications, and school lunches in private religious schools
FLA. STAT. § 220.13(1)(b)(1)	deducting from the calculation of income tax, the value of "excess charitable contributions" described by 26 U.S.C. § 170(d)(2)
FLA. STAT. § 220.13(2)	deducting from the calculation of income tax most federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170
FLA. STAT. § 220.183(2)(c)(11)	providing for a credit against income taxation for certain community contributions undertaken by an "eligible sponsor," defined to include community-based organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations) dedicated to providing affordable housing, or economic or community development
FLA. STAT. §§ 220.1875, 1002.395	providing for a tax credit against corporate income taxation for donations to scholarship-funding organizations which provide

Statute	Description
	scholarships for students attending private schools, including private religious schools
GEORGIA	
GA. CODE ANN. § 48-5-41(a)(2.1)-(3), (a)(6)	exempting from property taxation all places of religious worship, all property owned and operated as a church or association of churches when described by 26 U.S.C. § 501(c)(3), all property owned by religious groups and used as nonprofit single-family residences, all buildings used as colleges or seminaries of learning, and the property of certain nonprofit homes for the aged described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
GA. CODE ANN. § 48-5-470.2	exempting from property taxation on motor vehicles the vans and buses owned by religious groups used for maintaining exempt properties or for transporting individuals to religious services or on trips sponsored by such religious groups
GA. CODE ANN. § 48-7-27(a)(1)	deducting from the calculation of income tax all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170
GA. CODE	providing for a credit against income

Statute	Description
ANN. § 48-7-29.16	taxation for qualified donations to student scholarship organizations for the payment of tuition and fees at a qualified school (including private religious schools)
GA. CODE ANN. § 48-7-100(10)(C)	excluding from the definition of "wages" for the purpose of income tax withholding requirements remuneration paid for services performed by a minister in the exercise of his ministry or by members of a religious order in the exercise of the duties of that order
GA. CODE ANN. § 48-8-3(7.1), (9), (10), (13), (15), (16), (39)	exempting from sales taxation sales of tangible property and services to nonprofit organizations designated to provide services to the mentally handicapped, to be used by private schools, sales of food to pupils and employees of certain private elementary and secondary schools, sales of any religious publication, certain fundraising sales by religious institutions, sales of pipe organs or steeple bells to any church described by 26 U.S.C. § 501(c)(3), sales of the Bible and similar religious texts, and certain fundraising sales by private schools
GA. CODE ANN. § 48-13-5(2)(13)(v)	exempting from the calculation of "gross receipts" for the purpose of an excise tax the revenue from

Statute	Description
	charitable contributions received by certain nonprofit organizations
HAWAII	
HAW. REV. STAT. §§ 235-2, 235-2.2, 235-2.3	deducting from the calculation of income tax most federal itemized deductions including the deduction for charitable donations described by 26 U.S.C. § 170 (which includes donations to religious organizations)
HAW. REV. STAT. § 235-55.6	providing for a credit against income taxation for expenses for certain dependent care services
HAW. REV. STAT. § 237-16.8	exempting from excise taxation the value or income from convention or conference fees to religious, educational, or other charitable organizations described by 26 U.S.C. § 501(c)(3)
HAW. REV. STAT. § 237-23(a)(4)	exempting from excise taxation religious, educational, or other charitable organizations
HAW. REV. STAT. § 237D-3(2), (3)	exempting from excise taxation on accommodations the school dormitories of private schools and lodging provided by nonprofit organizations for religious, educational, or charitable purposes
HAW. REV. STAT. § 246-32(b)(1), (3)	exempting from property taxation schools that satisfy compulsory attendance laws (which include religious schools), colleges, property

Statute	Description
	used for church purposes, and parsonages
HAW. REV. STAT. § 256-4	exempting from income taxation qualified college savings accounts that permit taxpayers to save for the higher education tuition expenses of a beneficiary
IDAHO	
IDAHO CODE ANN. § 63-602B	exempting from property taxation property belonging to any religious organization used for any religious, educational, or recreational purposes
IDAHO CODE ANN. § 63-602E	exempting from property taxation all property used for a nonprofit school or for educational purposes
IDAHO CODE ANN. § 63-3022(j)(2)	deducting from the calculation of income tax all federal itemized deductions, including the deduction for charitable contributions defined by 26 U.S.C. § 170 (which includes donations to religious organizations)
IDAHO CODE ANN. § 63-3025B	exempting from income taxation organizations described by 26 U.S.C. § 501(a), including religious organizations
IDAHO CODE ANN. § 63-3029A	providing for a credit against income taxation half the value of all donations to charities for the benefit of certain schools
IDAHO CODE	exempting from sales taxation the

Statute	Description
ANN. § 63-3622J	sale of certain meals at private schools, under programs to provide meals for the aging, and by a church to its members
IDAHO CODE ANN. § 63-3622O(1)(a)	exempting from sales taxation sales to or by educational institutions, defined to include religious schools
IDAHO CODE ANN. § 63-3622KK	exempting from sales taxation those religious organizations described by IDAHO CODE ANN. § 63-6023
ILLINOIS	
35 ILL. COMP. STAT. 5/203(e)(1)	deducting from the calculation of income tax the value of all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes donations to religious organizations)
35 ILL. COMP. STAT. 5/205	exempting from income taxation organizations described by 26 U.S.C. § 501(a) (which includes religious organizations)
35 ILL. COMP. STAT. 5/210	providing for a credit against corporate income taxation for expenses paid by an employer to provide a child care facility for its employees
35 ILL. COMP. STAT. 5/218	providing for a credit against corporate income taxation for contributions to employees' college savings accounts, which will reduce

Statute	Description
	the higher education tuition expenses of a beneficiary
35 ILL. COMP. STAT. 105/3-5(4), 120/2-5	exempting from income taxation and from excise taxation on retailers the personal property of religious, educational, and other charitable organizations for the benefit of seniors
35 ILL. COMP. STAT. 155/3, 155/4, 157/10-15, 158/15-10	exempting from excise taxation on the use of automobiles, aircraft, and watercraft and on the rental of automobiles the use or rental of such vehicles by religious, educational, and other charitable organizations
35 ILL. COMP. STAT. 173/5-50	exempting from excise taxation on gas the use of gas by religious, educational, and other charitable organizations
35 ILL. COMP. STAT. 200/15-35	exempting from property taxation all property of schools (including theological seminaries and other religious schools) and related buildings such as dormitories
35 ILL. COMP. STAT. 200/15-40(a), (b)	exempting from property taxation the property of churches, religious organizations and denominations, parsonages, and property used exclusively for religious purposes, for religious and educational purposes, and for orphanages,
35 ILL. COMP.	exempting from property taxation all

Statute	Description
STAT. 200/15-65	property of institutions of public charity, charitable organizations, and organizations the net income of which goes to support the religious, charitable, or beneficent activities of its owner
35 ILL. COMP. STAT. 200/15-125	exempting from property taxation the parking areas owned by religious, educational, or other charitable organization and used to further the charitable purposes of said organization and the parking areas owned by a religious institution and rented to a mass transportation entity
35 ILL. COMP. STAT. 200/31-45(b)	exempting from transfer taxation deeds or trust documents relating to property acquired by or from any religious, educational, or charitable organization
INDIANA	
IND. CODE §§ 6-1.1-10-16(a), (c), (d), 6-1.1-10-36.3(c)(2)	exempting from property taxation buildings and land used for religious, educational, or other charitable purposes
IND. CODE §§ 6-1.1-10-21, 6-1.1-10-36.3(c)(2)	exempting from property taxation buildings used for religious worship, pews, furniture, and underlying land, and certain parsonages owned by or held in trust for a religious

Statute	Description
	society
IND. CODE §§ 6-1.1-10-22, 6-1.1-10-36.3(e)(2)	exempting from property taxation land one acre or smaller that is owned by a church and used as a dormitory for students
IND. CODE §§ 6-1.1-10-32, 6-1.1-10-33, 6-1.1-10-36.3(e)(2)	exempting from property taxation tangible property under the control of an executor that is to pass under the terms of a will to a religious, benevolent, or other charitable organization or it is to be used and applied for a religious, educational or other charitable purpose
IND. CODE § 6-2.5-5-21(b)(1)(B), (D)	exempting from sales taxation sales of food by churches, monasteries, private religious schools, and other religious, educational, and charitable organizations
IND. CODE § 6-2.5-5-26	exempting from sales taxation certain sales of tangible property and sales by religious, educational, and other charitable organizations
IND. CODE § 6-3-2-2.8	exempting from income taxation organizations described by 26 U.S.C. § 501(a) (which includes religious organizations)
IND. CODE § 6-3-3-5	providing for a credit against income taxation for donations to institutions of higher education, including religious institutions
IND. CODE §§	providing for a credit against income

Statute	Description
6-3-3-5.1, 21-12-7-4	taxation for contributions made to an educational scholarship program described by IND. CODE § 21-12-7-1
IND. CODE § 6-3-3-12	providing for a credit against income taxation for contributions made to a college savings plan for the higher education tuition expenses of a beneficiary, including for students in qualified religious schools and seminaries
IND. CODE § 6-3.1-9-2	providing for a credit for donations to neighborhood organizations that provide neighborhood assistance or education to the unemployed
IND. CODE § 6-3.1-30.5-7	providing for a credit against income taxation for contributions to a scholarship granting organization described by IND. CODE § 6-3.1-30.5-3
IND. CODE § 6-3.5-5-4	exempting from local excise taxation on vehicles the buses owned and operated by a religious or nonprofit youth organizations and used for transportation to religious services or to member functions
IND. CODE §§ 6-9-13-1(b), 6-9-34-1(b)	exempting from excise taxation events sponsored by educational institutions, religious organizations, and other organizations described by 26 U.S.C. § 170
IND. CODE §	exempting from excise taxation

Statute	Description
6-9-42-2	events sponsored by educational institutions and religious organizations
Iowa	
Iowa Code § 422.9(2)	deducting from the calculation of income taxation many federal itemized deductions, including the deduction for charitable donations described by 26 U.S.C. § 170
Iowa Code § 422.11S	providing for a credit against income taxation for donations made to a school tuition organization that provides scholarships to children for attendance at qualified nonpublic schools
Iowa Code § 422.12(2)(b)	providing for a credit against income taxation for expenses paid for the tuition and textbooks of dependents at accredited or approved schools under Iowa Code § 256.11 (which applies equally to private religious schools)
Iowa Code § 422.12C(1)	providing for a credit against income taxation for child and dependent care expenses described by 26 U.S.C. § 21 (which includes expenses for child care services rendered by a church or religious organization)
Iowa Code § 422.34	exempting from corporate income taxation organizations described by 26 U.S.C. § 501(a) (which includes

Statute	Description
	religious organizations)
IOWA CODE § 423.3(17), (78), (87), (88)	exempting from sales taxation all goods used for educational purposes sold to any private nonprofit educational institution, toys sold to a nonprofit organization described by 26 U.S.C. § 501 (which includes religious organizations) that distributes them to children at no cost, building materials sold to a nonprofit organization dedicated to the construction and remolding of low-income residences (if such goods are used in such residences), and rental or tangible property or services rendered where the profits therefrom are used by or donated to nonprofit organizations described by 26 U.S.C. § 501(c)(3) and used for educational, religious, or other charitable purposes
IOWA CODE § 423A.5(2)(b)	exempting from excise taxation on hotels and motels the price of lodging at a property described by IOWA CODE § 427.1(8) (which includes property owned by a religious institution) paid by the guests of a religious institution who are present for a religious retreat or function
IOWA CODE § 427.1(8), (9)	exempting from property taxation certain property of religious

Statute	Description
	educational, and other charitable institutions
IOWA CODE § 450.4(2), (10)	exempting from estate taxation religious, educational, and other charitable organizations described by 26 U.S.C. §§ 170(c), 2055, and the value of any interest in a qualified tuition plan described by 26 U.S.C. § 529 (which covers tuition expenses to be paid to religious schools)
KANSAS	
KAN. STAT. ANN. § 79-201	exempting from property taxation property owned by certain religious or other charitable institutions and property used for religious or charitable purposes
KAN. STAT. ANN. § 79-201b(4)	exempting from property taxation property operated by religious or other charitable organizations for the benefit of the poor
KAN. STAT. ANN. § 79-201u	exempting from property taxation motor vehicles donated to organizations described by 26 U.S.C. §§ 170(c)(2), 501(c)(3) (which include religious organizations)
KAN. STAT. ANN. § 79-15,222	exempting from estate taxation portions of an estate transferred to charitable organizations described by 26 U.S.C. § 2055(a) (which includes religious organizations)
KAN. STAT.	providing for a credit against income

Statute	Description
ANN. § 79-32,111a	taxation for dependent care expenses described by 26 U.S.C. § 21 (which includes care rendered in churches and by religious organizations)
KAN. STAT. ANN. § 79-32,113	exempting from income taxation organizations described by 26 U.S.C. § 501(a) (which includes religious organizations) or otherwise exempt from federal income taxation
KAN. STAT. ANN. § 79-32,120	deducting from the calculation of income tax all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
KAN. STAT. ANN. §§ 79-32,195, 79-32,196	providing for a credit against income taxation for contributions to community service organizations, defined with reference to 26 U.S.C. § 501(c)(3) (which includes religious organizations), that provide certain educational and social services
KAN. STAT. ANN. § 79-3606(c), (d), (h), (v), (ii), (aaa), (bbb), (iii), (ppp)	exempting from sales taxation all sales of personal property and services to private schools and educational institutions (including religious schools and institutions) used for secular programs or for the repair of the physical building to a contractor for the purpose of constructing or repairing the

Statute	Description
	structures of certain charitable institutions, rentals of secular textbooks by private schools, to a contractor for use in preparing meals to homebound elderly people as part of a nonprofit food service project, sales to religious organizations described by 26 U.S.C. § 501(c)(3) or to a contractor for the purpose of constructing or repairing the buildings of religious organizations, all sales of food for human consumption by organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations), sales to organizations described by 26 U.S.C. § 501(c)(3) for use in the collection and distribution of food products on a charitable basis, and sales to or for a homeless shelter described by 26 U.S.C. § 501(c)(3)
KAN. STAT. ANN. § 79-5116a	providing for the cancellation of past due motor vehicle property taxes for vehicles donated to charitable organizations described by 26 U.S.C. § 501(c)(3)
KENTUCKY	
KY. REV. STAT. ANN. § 132.190	exempting from property taxation the property expressly mentioned in the state constitution, including by KY. CONST. § 170 (exempting from

Statute	Description
	property taxation real and personal property owned by religious and educational institutions and institutions of "purely public charity")
KY. REV. STAT. ANN. § 136.070	exempting from corporate license taxation tax certain exempt organizations described by 26 U.S.C. § 501 and other religious, charitable, and educational non-profit organizations
KY. REV. STAT. ANN. § 136.392(5)(b), (c)	exempting from a utility "premium surcharge" (an excise tax on utilities) educational and charitable institutions described by 26 U.S.C. § 501(c)(3) and certain other nonprofit religious institutions
KY. REV. STAT. ANN. § 136.608	exempting from excise taxation on communications services certain services purchased by charitable organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
KY. REV. STAT. ANN. § 138.358	providing for a credit against excise taxation on fuels sold to organizations described by KY. REV. STAT. ANN. § 139.495 (which includes religious organizations)
KY. REV. STAT. ANN. § 138.470(2)	exempting from excise taxation on motor vehicles those vehicles titled or registered to pure public charities

Statute	Description
	and educational institutions
KY. REV. STAT. ANN. § 139.495	exempting from sales taxation certain sales involving organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
KY. REV. STAT. ANN. § 139.496	exempting from sales taxation, up to $1000, sales by certain nonprofit organizations
KY. REV. STAT. ANN. § 140.060	exempting from inheritance and estate taxation all transfers of property to religious or charitable organizations and all transfers for religious or charitable purposes
KY. REV. STAT. ANN. §§ 141.040(1)(f), (g), 141.0401(6)(g)	exempting from corporate income taxation and from excise taxation on limited liability entities such corporations or entities described by 26 U.S.C. § 501 and other religious, educational, and charitable organizations
LOUISIANA	
LA. REV. STAT. ANN. § 26:421	exempting from excise taxation on alcohol the possession or the use of wine for religious purposes
LA. REV. STAT. ANN. § 33:2828	facilitating the exemption from property taxation described by LA. CONST. art. VII, § 21(B) (referring to property owned by religious, educational, or other charitable nonprofit organizations exempt from

Statute	Description
	federal or state income tax)
LA. REV. STAT. ANN. § 47:37	providing for a credit against income taxation for contributions to educational institutions, including private religious schools
LA. REV. STAT. ANN. § 47:57(2)	deducting from the calculation of income tax the value of contributions made to religious, educational, or other charitable organizations
LA. REV. STAT. ANN. § 47:111(5)	excluding from the definition of "wages" for the purpose of income tax withholding any remuneration paid for services performed by a minister in the exercise of his ministry or by the members of a religious order in the exercise of the duties of that order
LA. REV. STAT. ANN. § 47:121(5)	exempting from corporate income taxation religious and other charitable organizations
LA. REV. STAT. ANN. § 47:182	deducting from the calculation of estate and trust income tax the value of portions of estates and trusts paid or set aside for charitable (including religious) purposes
LA. REV. STAT. ANN. § 47:287.501	exempting from corporate income taxation certain organizations described by 26 U.S.C. § 501 (which includes religious organizations)
LA. REV. STAT. ANN. §	providing for a credit against income taxation for educational expenses for

Statute	Description
47:297(D)	each dependent child in school
LA. REV. STAT. ANN. § 47:305(D)(2)	exempting from sales taxation the sale of meals to the staff and students of educational institutions and the sale of occasional meals furnished to the public by religious organizations
LA. REV. STAT. ANN. §§ 47:305.13, 47:305.14(A)(1)	exempting from sales taxation sales of entertainment admissions, property, and other items at (or for) events provided by charitable and other religious organizations, where the proceeds go to furthering the organization's charitable purposes
LA. REV. STAT. ANN. § 47:305.14(A)(1)	exempting from sales taxation the sale of newspapers by religious organizations
LA. REV. STAT. ANN. § 47:315.5	exempting from sales taxation (*ex post* in the form of a restricted refund) sales by certain charitable organizations (including religious organizations) of donated tangible property or items made using such property
LA. REV. STAT. ANN. § 47:360(C)(2)	exempting from license taxation those nonprofit organizations described by LA. REV. STAT. ANN. § 47:305.14 or 26 U.S.C. § 501(a) (which include religious organizations)

Statute	Description
LA. REV. STAT. ANN. § 47:468	exempting from vehicle license taxation passenger vehicles that carry more than seven people used in the transportation of teachers or students to or from their schools or used by nonprofit charitable institutions
LA. REV. STAT. ANN. § 47:608(5)	exempting from corporate franchise taxation religious, educational, and other charitable organizations
LA. REV. STAT. ANN. § 47:6019	providing for a credit against income and corporate franchise taxation for the rehabilitation of certain historic structures
LA. REV. STAT. ANN. § 47:6104	providing for a credit against income taxation for child care expenses, including for care rendered in churches and religious settings
LA. REV. STAT. ANN. § 47:6105	providing for a credit against income taxation for operating a child care facility, including for organizations with a religious affiliation that are not exempt from income tax
MAINE	
ME. REV. STAT. ANN. tit. 36 § 652(1)(G)	exempting from property taxation houses of worship and the tangible furniture within, certain parsonages, and personal property owned by religious societies
ME. REV.	exempting from property taxation

Statute	Description
STAT. ANN. tit. 36 § 1483	vehicles used solely for the benefit of charitable institutions, religious societies, and houses of worship
ME. REV. STAT. ANN. tit. 36 § 1760(6), (16), (19), (43), (44), (64), (65)	exempting from sales taxation sales of meals to private school students and teachers and to residents of church-affiliated housing facilities for the elderly, sales to churches, houses of worship, and, rentals charged to students for living quarters necessitated by attendance at school, sales to licensed nursery and day-care centers, sales to certain church affiliated nonprofit organizations that operate residential housing, sales of property and services by schools and school-sponsored student organizations (including in religious schools), and sales of certain items to monasteries and convents
ME. REV. STAT. ANN. tit. 36 § 1864	exempting from use taxation those organizations exempt from sales taxation under ME. REV. STAT. ANN. tit. 36 § 1760 (which includes religious organizations)
ME. REV. STAT. ANN. tit. 36 § 2557	exempting from a 5% service tax sales to schools (including religious schools), organized churches, and houses of worship
ME. REV. STAT. ANN.	deducting from the calculation of income tax all federal itemized

Statute	Description
tit. 36 § 5125	deductions, including the deduction for 26 U.S.C. § 170 (regarding donations to charitable organizations)
ME. REV. STAT. ANN. tit. 36 § 5162	exempting from income taxation entities described by 26 U.S.C. § 501(a) and other entities exempt from federal income taxation
ME. REV. STAT. ANN. tit. 36 § 5217	providing for a credit against income taxation for the expenses of an employer incurred to provide daycare for employees
ME. REV. STAT. ANN. tit. 36 § 5218	providing for a credit against income taxation for expenses for household and dependent care services, including care rendered in churches and religious settings
ME. REV. STAT. ANN. tit. 36 § 5218-C	providing for a credit against income taxation equal to 5% of certain federally deductible charitable contributions (which include contributions to religious organizations)
MARYLAND	
MD. CODE ANN., TAX-GEN. § 4-103(b)(4)	exempting from admissions and amusement taxation any admission charges from which gross receipts are used for religious, educational or other charitable purposes
MD. CODE ANN., TAX-	exempting from sales taxation wine purchased by religious organizations

Statute	Description
GEN. § 5-104	for sacramental use
MD. CODE ANN., TAX-GEN. § 7-203	exempting from inheritance taxation property that passes to or for the use of organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
MD. CODE ANN., TAX-GEN. § 10-104	exempting from income taxation organizations described by 26 U.S.C. § 501 (which includes religious organizations)
MD. CODE ANN., TAX-GEN. § 10-218	deducting from the calculation of income tax all federal itemized deductions, including the deduction for 26 U.S.C. § 170 (regarding donations to charitable organizations)
MD. CODE ANN., TAX-GEN. § 10-716	providing for a credit against income taxation for certain dependent and child care expenses, including for care rendered in churches and religious settings
MD. CODE ANN., TAX-GEN. § 11-204(a)(3), (b)	exempting from sales and use taxation sales to and sales by certain religious, educational, and other charitable organizations
MD. CODE ANN., TAX-GEN. § 11-206(d)(1)	exempting from sales taxation sales of food by religious organizations
MD. CODE ANN., TAX-	exempting from property taxation certain property of nonprofit

Statute	Description
PROP. § 7-202(b)	charitable organizations
MD. CODE ANN., TAX-PROP. § 7-204	exempting from property taxation certain property owned by religious groups and organizations
MD. CODE ANN., TAX-PROP. § 7-206	exempting from property taxation continuing care facilities for the aged that are used exclusively for religious worship
MD. CODE ANN., TAX-PROP. § 9-222	authorizing county and municipal authorities to provide a tax credit against property taxation up to the entire property tax assessment on certain property leased, occupied, and used by religious organizations for religious worship, educational purposes, or necessary administrative space
MD. CODE ANN., TRANSP. § 13-810(a)(12), (24)	exempting from excise taxation on motor vehicles school buses owned by religious organizations or religious schools described by 26 U.S.C. § 501(c)(3)
MASSACHUSETTS	
MASS. GEN. LAWS ch. 59, § 5(10)-(13)	exempting from property taxation property owned by religious organizations, houses of worship, and certain parsonages
MASS. GEN. LAWS ch. 60A,	exempting from excise taxation on motor vehicles certain vehicles

Statute	Description
§ 1	leased to charitable organizations for a year or more
MASS. GEN. LAWS ch. 62, § 3(13)	deducting from the calculation of income tax the value of contributions to certain charitable organizations described by 26 U.S.C. § 170 (which includes religious organizations)
MASS. GEN. LAWS ch. 63, §§ 30(4), 38Y	excluding from corporate taxation the revenue to organizations described by 26 U.S.C. § 501 (which includes religious organizations), except to the extent they have unrelated business taxable income described by 26 U.S.C. § 512
MASS. GEN. LAWS ch. 64G, § 2	exempting from room occupancy excise taxation the lodging accommodations at certain charitable institutions, including religious institutions and private religious schools
MASS. GEN. LAWS ch. 64H, § 6(e), (f)	exempting from sales taxation certain sales to organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations) and certain sales of building materials necessary for the construction or repair of structures owned by organizations described by 26 U.S.C. § 501(c)(3)
MASS. GEN. LAWS ch. 64H,	exempting from sales taxation sales of publications used for religious

Statute	Description
§ 6(m)	worship and publications by organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
MASS. GEN. LAWS ch. 6411, § 6(cc)	exempting from sales taxation sales of certain meals by members of a church, the proceeds of which are used for religious or charitable purposes
MASS. GEN. LAWS ch. 641, § 7	exempting from excise taxation sales exempt under chapter 6411 (including sales to religious organizations, sales of building materials to construct or repair structures owned by religious organizations, sales of publications by religious organizations or of publications used in religious worship, and sales of certain meals by church members)
MASS. GEN. LAWS ch. 65C, § 3	deducting from the calculation of estate tax nearly all deductions permitted under federal estate tax law, including deductions under 26 U.S.C. § 2055 (permitting deductions for portions of an estate given to religious organizations)
MASS. GEN. LAWS ch. 65C, app., § 1	exempting from estate taxation estates granted to or for the use of certain charitable organizations, including religious institutions

Statute	Description
MASS. GEN. LAWS ch. 111M, § 3	exempting from a penalty (in function, an excise tax) for failure to maintain "creditable" medical coverage those who claim a religious objection to medical care
MASS. GEN. LAWS ch. 140, § 21E	exempting from license taxation on the distribution of certain food items such distribution by certain religious and other charitable organizations
MICHIGAN	
MICH. COMP. LAWS § 141.632	exempting from city income taxation any amounts received by religious, educational, and other charitable organizations described by 26 U.S.C. § 501(a) or otherwise exempt from federal taxation
MICH. COMP. LAWS § 205.54a	exempting from sales taxation certain sales to churches, certain nonprofit charitable organizations, and religious homes for the care of children and the aged
MICH. COMP. LAWS § 205.54d	exempting from sales taxation the sale of vehicles to or for private religious schools for use in driver education courses
MICH. COMP. LAWS § 205.54o	exempting from sales taxation fundraising sales by churches, other organizations described by MICH. COMP. LAWS § 205.54q, and clubs or auxiliary organizations of the listed organizations

Statute	Description
MICH. COMP. LAWS § 205.54p	exempting from sales taxation sales of property to be used in modifying or constructing a sanctuary used by charitable organizations (described by 26 U.S.C. § 501(c)(3)) for public worship
MICH. COMP. LAWS § 205.54q	exempting from sales taxation certain sales to charitable organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations) and certain other certified charitable organizations
MICH. COMP. LAWS § 205.54bb	exempting from sales taxation certain sales of automobiles to "qualified organizations," which include organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations) and certain other charitable organizations
MICH. COMP. LAWS § 205.94	exempting from use taxation property or services sold to organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations), certain other charitable organizations, and other churches and religious organizations
MICH. COMP. LAWS § 205.94m	exempting from use taxation property acquired by a person engaged in modifying or constructing a sanctuary used by charitable organizations (described by 26

Statute	Description
	U.S.C. § 501(c)(3)) for public worship
MICH. COMP. LAWS § 205.94w	exempting from use taxation the donation of a motor vehicle to certain churches and houses of worship
MICH. COMP. LAWS § 205.184	providing for a credit against sales taxation for expenses paid by organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations) on goods sold at charitable auctions
MICH. COMP. LAWS § 205.201	exempting from gift taxation certain transfers of property to charitable, educational, and religious organizations
MICH. COMP. LAWS § 206.30(z)	deducting from the calculation of income tax the value of contributions to certain charitable organizations, including religious organizations described by 26 U.S.C. § 501(c)(3)
MICH. COMP. LAWS § 206.201	exempting from income taxation entities described by 26 U.S.C. § 501(c)(3) or otherwise exempt from federal income taxation
MICH. COMP. LAWS § 206.260(1)(g), (k)	providing for a credit against income tax for 50% of the value of charitable contributions to institutions of higher learning and nonprofit corporations operating for the benefit of institutions of higher learning

Statute	Description
MICH. COMP. LAWS § 206.261	providing for a credit against income taxation for 50% of the value of donations to certain "community foundations," defined in part to include organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
MICH. COMP. LAWS § 206.274	providing for a credit against income taxation for tuition and fees paid by certain taxpayers to qualified institutions of higher learning, defined with reference to MICH. COMP. LAWS § 206.260, that do not educate solely in religious doctrine or worship
MICH. COMP. LAWS § 207.526(w)	exempting from property transfer taxation written instruments conveying property from one religious society to another, if the property is described by MICH. COMP. LAWS § 211.7s (relating to parsonages, houses of worship, and facilities used to teach religious doctrine)
MICH. COMP. LAWS § 207.1030	exempting from sales taxation on motor fuel such fuel sold directly to a private religious school to be used in a school bus owned (or leased) and operated by that school
MICH. COMP. LAWS §	exempting from corporate income taxation most organizations exempt

Statute	Description
208.1207	from federal corporate income taxation, including religious organizations described by 26 U.S.C. § 501(c)(3)
MICH. COMP. LAWS § 208.1421(1)(c)	providing for a credit against corporate income taxation for 50% of the value of charitable donations to institutions of higher learning and nonprofit corporations operating for the benefit of institutions of higher learning
MICH. COMP. LAWS § 208.1425	providing for a credit against corporate income taxation for 50% of the value of donations to certain "community foundations," defined in part to include organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
MICH. COMP. LAWS § 211.7n	exempting from property taxation property owned by certain educational institutions
MICH. COMP. LAWS § 211.7o	exempting from property taxation property owned by certain charitable institutions
MICH. COMP. LAWS § 211.7s	exempting from property taxation property owned by a religious society and used as a parsonage, for religious services, or to teach religious doctrine
MICH. COMP.	exempting from personal property

Statute	Description
LAWS § 211.9	taxation the property of certain charitable organizations
MICH. COMP. LAWS § 289.3119	exempting from license taxation of food service establishments religious and other charitable organizations described by 26 U.S.C. § 501(c)(3)
MICH. COMP. LAWS § 436.1301	exempting from excise taxation on alcohol any wine used by churches for religious purposes
MINNESOTA	
MINN. STAT § 168.012(a)(4)	exempting from vehicle tax and license fees vehicles owned by nonprofit churches used to transport disabled persons for religious, educational, or other charitable purposes
MINN. STAT. § 272.02	exempting from property taxation all churches, church property, houses of worship, and certain other institutions described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
MINN. STAT. § 290.01(19), (19b)(3)	deducting from the calculation of income tax the amount paid to others (less the amount used to claim the credit provided by MINN. STAT. § 290.0674) for qualifying education expenses including private religious school tuition
MINN. STAT. § 290.01(19),	deducting from the calculation of income tax most federal itemized

Statute	Description
(19b)(6)	deductions, including the deduction for 26 U.S.C. § 170 (regarding donations to charitable organizations)
MINN. STAT. § 290.05(2)	exempting from income and franchise taxation organizations described by 26 U.S.C. § 501(a) (which includes religious organizations)
MINN. STAT. § 290.0674	providing for a credit against income taxation for certain education related expenses, including expenses paid relating to religious education
MINN. STAT. § 295.53	exempting from excise taxation imposed on certain medical facilities the value of charitable donations made to such facilities
MINN. STAT. § 297A.67(5), (13), (13a), (14)	exempting from sales taxation sales of meals, textbooks, instructional materials, and computers, at or for use in schools, including private religious schools
MINN. STAT. § 297A.70(4)	exempting from sales and excise taxation certain sales to charitable, religious, and educational organizations
MINN. STAT. § 297A.70(9)	exempting from sales and excise taxation wine purchased for the purpose of religious ceremony
MINN. STAT. § 297A.70(13)	exempting from sales and excise taxation sales of tangible property

Statute	Description
(c), (14)	and certain admission or events charges for the purpose of benefiting the charitable, religious, or educational function of charitable organizations (defined to include religious organizations)
MINN. STAT. § 297A.71(22)	exempting from sales and excise taxation sales of building materials and equipment to nonprofit organizations (defined to include religious organizations) used to render residential structures accessible to disabled persons
MINN. STAT. §§ 297B.01 (16)(c)(5), 297B.03(11)	exempting from sales taxation certain transfers of motor vehicles (both gifts and actual sales) to organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
MINN. STAT. § 297G.07	exempting from excise taxation on alcohol any wine sold for religious purposes
MINN. STAT. § 317A.909(3)	exempting from property taxation real property used by a religious corporation for religious purposes
MISSISSIPPI	
MISS. CODE ANN. § 27-7-15(4)(f)	exempting from income taxation any income received by a religious denomination or by any institution organized for religious, Bible, benevolent, educational, or other

Statute	Description
	charitable purposes
MISS. CODE ANN. § 27-7-17(1)(h)	deducting from the calculation of corporate income tax the contributions or gifts made by corporations to religious, educational, or other charitable organizations
MISS. CODE ANN. § 27-7-17(3)(a)	deducting from the calculation of income tax all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
MISS. CODE ANN. § 27-7-22.31	providing for a credit against income taxation for expenses for the rehabilitation of certified historic structures
MISS. CODE ANN. § 27-7-29(a)(3)	exempting from income taxation religious, educational, and other charitable organizations
MISS. CODE ANN. § 27-13-63(c)	exempting from franchise taxation religious, educational, and other charitable organizations
MISS. CODE ANN. § 27-27-301	exempting from excise taxation on vending machines those machines the proceeds of which are used exclusively for charitable purposes
MISS. CODE ANN. § 27-31-	exempting from property taxation all real and personal property owned by any religious or charitable society or

Statute	Description
1(d), (dd)	congregation and all real and personal property used for the housing and provision of services to the elderly, disabled, and mentally impaired or as a nursing home, the membership or governing body of which is appointed or confirmed by a religious society
MISS. CODE ANN. § 27-31-41(m)	exempting from property taxation on motor vehicles all motor vehicles owned by a religious society or educational institution that seat more than seven people and are used for transporting passengers for religious or educational purposes; also exempting one motor vehicle (not described above) owned by any religious society and not used for profit
MISS. CODE ANN. § 27-65-3(h)	exempting from sales taxation meals prepared by a restaurant and donated to a charitable organization described by 26 U.S.C. § 501(c)(3) that regularly provides food to the needy
MISS. CODE ANN. § 27-65-22(3)(a), (b)	exempting from sales taxation on amusement admissions those admissions charged to hear gospel singing and admissions charged by a place of amusement operated by religious, educational, or other charitable organizations when the

Statute	Description
	net proceeds of which go solely to religious or other charitable purposes
MISS. CODE ANN. § 27-65-111(b), (e), (g), (aa)	exempting from sales taxation sales of certain newspapers and periodicals of educational organizations described by 26 U.S.C. § 501(c)(3), sales of personal property to an orphanage or home for the elderly supported at least in part by a religious denomination or other nonprofit organization, sales to schools owned by corporations or associations exempt from state income taxation (including religious organizations described by MISS. CODE ANN. §§ 27-7-15, 27-7-29), and sales of tangible property to nonprofit organizations described by 26 U.S.C. § 501(c)(3) that provide rehabilitation for victims of substance abuse
MISS. CODE ANN. § 27-67-7(i)	exempting from use taxation the literature, video, photography, and certain digital media of religious institutions (defined by 26 U.S.C. § 501(c)(3)) for the propagation of their creeds or for their nonprofit religious activities
MISS. CODE ANN. § 37-57-113	exempting from excise and transfer taxation on the construction and purchase of family homes those

Statute	Description
	units purchased or constructed by or for religious, educational, or other charitable institutions
Missouri	
Mo. Rev. Stat. § 67.1177	exempting from excise taxation on hotels and other sleeping accommodations those facilities operated by a church for the purpose of providing religious education and recreation to church members
Mo. Rev. Stat. §§ 92.130(6), 92.220(6)	exempting from local income taxation religious, educational, and other charitable organizations
Mo. Rev. Stat. § 94.802(3.)(10)	exempting from excise taxation on accommodations those attractions owned and operated by schools or on an occasional basis for fundraising purposes by nonprofit charitable organizations
Mo. Rev. Stat. § 135.647	providing for a credit against income taxation for certain contributions to local food pantries described by 26 U.S.C. § 501(c)(3) (which includes religious organizations) that distribute emergency food supplies
Mo. Rev. Stat. § 137.100(5), (7)	exempting from property taxation real and personal property used exclusively for religious worship, for schools, or for purely charitable purposes, and motor vehicles leased

Statute	Description
	to religious, educational, or other chartable organizations described by 26 U.S.C. § 501(c)(3)
Mo. Rev. Stat. § 143.141	deducting from the calculation of income tax most federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
Mo. Rev. Stat. § 143.441	exempting from corporate income taxation organizations described by 26 U.S.C. § 501(c) (which includes religious organizations)
Mo. Rev. Stat. § 144.011(1.)(13)	exempting from sales taxation fees or dues to orders or associations operating under the lodge system that are substantially devoted to religious, educational, or other charitable purposes
Mo. Rev. Stat. § 144.030(2.)(19)	exempting from sales taxation all sales by or to religious and other charitable organizations in their religious, educational, or charitable functions
Mo. Rev. Stat. § 144.450(4), (5)	exempting from use taxation on motor vehicles those vehicles owned or used by religious or other charitable organizations for the conduct of their religious or charitable functions and motor

Statute	Description
	vehicles used by religious organizations to transport students to and from the school sponsored by such religious organization
MO. REV. STAT. §§ 148.040(3.), 148.150(3.), 148.630(3.)	deducting from the calculation of income tax on financial institutions certain contributions to religious, educational, or other charitable organizations
MO. REV. STAT. § 226.550	exempting from a "permit fee" (a license tax) for outdoor advertising religious organizations described by MO. REV. STAT. § 313.005(11)
MO. REV. STAT. § 316.010	exempting from local excise taxation on amusement any religious, educational, or charitable exhibition
MO. REV. STAT. § 316.040	exempting from license taxation on theatrical performances such performances for religious, educational, or other charitable purposes
MONTANA	
MONT. CODE ANN. § 15-6-201(1)(b), (d)	exempting from property taxation the buildings and furnishings owned by a church and used for religious worship or for certain parsonages and property used exclusively for educational purposes and supporting structures such as dormitories
MONT. CODE ANN. § 15-30-	deducting from the calculation of income tax most federal itemized

Statute	Description
2131	deductions, including the deduction for charitable donations described by 26 U.S.C. § 170 (which includes donations to religious organizations)
MONT. CODE ANN. § 15-30-2151	exempting from estate and trust income taxation religious, educational, and charitable estates and trusts
MONT. CODE ANN. § 15-30-2152(2)(b)	deducting from the calculation of estate and trust income taxation the value of charitable contributions described by 26 U.S.C. § 642(c)
MONT. CODE ANN. § 15-30-2326	providing for a credit against income taxation for charitable contributions to the general endowment fund of a private college or its foundation
MONT. CODE ANN. §§ 15-30-2327, 15-30-2328	providing for a credit against income taxation for qualified planned gifts (in the year that such gift is planned) to certain irrevocable funds held by organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
MONT. CODE ANN. §§ 15-30-2342, 15-31-151	providing for a credit against income taxation for the rehabilitation expenditures for historic buildings
MONT. CODE ANN. §§ 15-30-2365, 15-31-133	providing for a credit against income taxation for expenses paid by an employer to acquire or improve real property to be used as a daycare

Statute	Description
	facility
MONT. CODE ANN. §§ 15-30-2373, 15-31-131	providing for a credit against income taxation for expenses paid by an employer for certain dependent care assistance provided by a licensed daycare provider
MONT. CODE ANN. § 15-31-102(1)(d)	exempting from corporate income taxation religious, educational, and charitable organizations
MONT. CODE ANN. § 15-31-114(1)(g)	deducting from the calculation of corporate income taxation charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
MONT. CODE ANN. §§ 15-31-161, 15-31-162	providing for a credit against corporate income taxation for contributions to a qualified endowment described by MONT. CODE ANN. §§ 15-30-2327
MONT. CODE ANN. § 15-31-172	deducting from the calculation of corporate income taxation the value of computer equipment donated to schools
MONT. CODE ANN. § 15-68-212	exempting from sales taxation sales of property or services by organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)

Statute	Description
NEBRASKA	
NEB. REV. STAT. § 77-202(1)(d)	exempting from property taxation the property of religious and other charitable organizations and organizations for the exclusive benefit of a religious or charitable organization and used exclusively for religious, educational, or other charitable purposes
NEB. REV. STAT. § 77-2007.04	exempting from inheritance taxation all bequests or gifts to or for the use of religious, educational, or other charitable organizations
NEB. REV. STAT. § 77-2701.24(4)	exempting from sales taxation the sales of goods or services by religious organizations during an event run by that organization and that occurs no more than once a year and lasts less than four days
NEB. REV. STAT. § 77-2704.10(2), (6)	exempting from sales taxation the sale or consumption of food sold by a church at a church function and admissions fees charged by a private school in a school during the school day or at a function of the school
NEB. REV. STAT. § 77-2704.12	exempting from sales taxation the receipts from the sale, lease, rental, or consumption of purchases by a nonprofit religious organization or private educational institution

Statute	Description
NEB. REV. STAT. § 77-2714	exempting from income taxation organizations described by 26 U.S.C. § 501(a) (which includes religious organizations) or otherwise exempt from federal income taxation
NEB. REV. STAT. § 77-2716.01(3)	deducting from the calculation of income tax all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
NEB. REV. STAT. § 77-27,230	providing for a credit against income taxation for charitable planned gifts made during the tax year to a qualified endowment
NEVADA	
NEV. REV. STAT. § 361.105	exempting from property taxation nonprofit private schools, their lots, furniture, and equipment
NEV. REV. STAT. §§ 361.110, 361.125, 361.135, 361.140	exempting from property taxation churches and buildings used for religious worship and certain other religious organizations, their lots, furniture, and equipment
NEV. REV. STAT. § 368A.200(2)(a), (5)(b)	exempting from excise taxation on admissions those admissions charges collected by nonprofit religious and charitable organizations described by 26 U.S.C. § 501(c) and live

Statute	Description
	entertainment provided by or for the benefit of a nonprofit religious or charitable organization described by 26 U.S.C. § 501 (c)
NEV. REV. STAT. §§ 369.070, 369.340	exempting from excise taxation on alcohol sales of alcohol to ministers for religious purposes
NEV. REV. STAT. § 372.315	exempting from sales taxation the gross receipts from the sale and consumption of tangible property that is a component part of a weekly newspaper
NEV. REV. STAT. §§ 372.326, 372.3261	exempting from sales and use taxation the gross receipts from the sale, use, or consumption of tangible property sold by or to certain nonprofit religious, educational, or charitable organizations
NEV. REV. STAT. § 372.327	exempting from sales and use taxation any property loaned or donated to religious or other charitable organizations
NEV. REV. STAT. § 372.7287	exempting from sales and use taxation on motor vehicles any type of motor vehicle that is transferred for use by nonprofit religious, educational, or other charitable organizations
NEV. REV. STAT. §§	exempting from additional sales and use taxation for the exclusive

Statute	Description
374.290, 374.320, 374.3305, 374.3306, 374.331	support of the public schools sales of food by private schools and student organizations, sales of the component parts of newspapers, other property sold by or to nonprofit religious, educational, and other charitable organizations, and property loaned or donated to religious and charitable organizations
NEV. REV. STAT. § 375.090(13), (14)	exempting from transfer taxation the transfer of property to an educational foundation (described by NEV. REV. STAT. § 388.750) dedicated to the support of certain schools or to a university foundation (described by NEV. REV. STAT. § 396.405) dedicated to the support of certain post-secondary schools
NEW HAMPSHIRE	
N.H. REV. STAT. ANN. § 72:23(III)-(V)	exempting from property taxation houses of public worship, parsonages, convents, monasteries, all schools (and supporting structures such as dormitories), other charitable organizations, and certain surrounding lands
N.H. REV. STAT. ANN. § 72:23-k	exempting from property taxation the real and personal property of charitable housing and health care

Statute	Description
	facilities for the elderly
N.H. REV. STAT. ANN. § 77:8	exempting from income taxation educational, religious, and other charitable organizations
N.H. REV. STAT. ANN. § 77:41	exempting from income taxation the gambling revenue received by religious, educational, and other charitable organizations
N.H. REV. STAT. ANN. § 77-A:4	deducting from the calculation of a tax on corporate profits a portion of the value of certain donations to charitable organizations, including religious organizations
N.H. REV. STAT. ANN. § 78-B:2(VII)	exempting from transfer taxation the transfer of title from one organization described by 26 U.S.C § 501 (which includes religious organizations) to another organization described by 26 U.S.C § 501
NEW JERSEY	
N.J. STAT. ANN. § 40:48C-41	exempting from local taxation any religious, educational, or other charitable organization
N.J. STAT. ANN. § 54:4-3.6	exempting from property taxation schools, buildings used for religious and other charitable purposes, certain parsonages, and certain surrounding lands
N.J. STAT.	exempting from property taxation all

Statute	Description
ANN. § 54:4-3.7	endowments or funds held for religious or other charitable purposes
N.J. STAT. ANN. § 54:4-3.35	exempting from property taxation a dwelling house owned by a religious association occupied by a clergyman who is superintendent of such association
N.J. STAT. ANN. § 54:4-3.52	exempting from property taxation buildings (and supporting land) certified has historic sites
N.J. STAT. ANN. §§ 54:8A-35(b), 54:8A-37(b)(4)	deducting from the calculation of income tax certain donations to religious, educational, and other charitable organizations
N.J. STAT. ANN. § 54:10A-3(e)	exempting from corporate franchise taxation certain nonprofit corporations
N.J. STAT. ANN. § 54:32B-8.3	exempting from sales taxation sales of food in schools
N.J. STAT. ANN. § 54:32B-8.5	exempting from sales taxation receipts from the sales of newspapers and certain periodicals
N.J. STAT. ANN. § 54:32B-8.21	exempting from sales taxation school textbooks for use in schools approved by the Department of Education
N.J. STAT. ANN. § 54:32B-8.25	exempting from sales taxation sales of the Bible and similar sacred scripture

Statute	Description
N.J. STAT. ANN. § 54:32B-9	exempting from sales taxation sales by or to religious, educational, and other charitable organizations
N.J. STAT. ANN. § 54:34-4(d)	exempting from transfer taxation the portion of an estate transferred for the use of any church, educational institution, Bible society, religious or other charitable organization
N.J. STAT. ANN. § 54A:2-1	exempting from income taxation all charitable trusts
NEW MEXICO	
N.M. STAT. ANN. §§ 7-2-2, 7-2-3	deducting from the calculation of income tax all federal itemized deductions, including the itemized deduction for charitable contributions described by 26 U.S.C. § 501(c)(3) (which includes contributions to religious institutions)
N.M. STAT. ANN. § 7-2-4	exempting from income taxation religious, educational, and other charitable organizations described by 26 U.S.C. § 501(c)
N.M. STAT. ANN. § 7-2-18.1	providing for a credit against income taxation for dependent childcare expenses
N.M. STAT. ANN. §§	providing for a credit against income taxation for the restoration or

Statute	Description
7-2-18.2, 7-2A-8.6	preservation of certain cultural property
N.M. STAT. ANN. § 7-2A-4	exempting from corporate income and franchise taxation religious, educational, and other charitable organizations described by 26 U.S.C. § 501(c)
N.M. STAT. ANN. § 7-2A-14	providing a credit against corporate income taxation for expenses paid to help employees obtain childcare
N.M. STAT. ANN. § 7-9-13.4	exempting from excise taxation on gross receipts certain receipts from the sale of textbooks required for courses at certain educational institutions
N.M. STAT. ANN. § 7-9-16	exempting from excise taxation on gross receipts the receipts of nonprofit entities from the operation of homes of the aged
N.M. STAT. ANN. § 7-9-29	exempting from excise taxation on gross receipts organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
N.M. STAT. ANN. § 7-9-41	exempting from excise taxation ministers of religious organizations described by 26 U.S.C. § 501(c)(3)
N.M. STAT. ANN. §§ 7-9-63, 64	exempting from excise taxation certain receipts from publishing newspapers and magazines

Statute	Description
N.M. STAT. ANN. § 7-15A-5	exempting from vehicle use taxation school buses and buses operated by religious or other charitable organizations
N.M. STAT. ANN. § 7-36-7(B)(1)	exempting from property taxation property described by N.M. CONST. art. VIII, § 3 (which includes church property and property used for educational or charitable purposes) and facilities licensed to operate as a nursing facility and owned by certain organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
NEW YORK	
N.Y. REAL PROP. TAX LAW § 420-a	exempting from property taxation real property owned by religious, educational, or other charitable organizations
N.Y. REAL PROP. TAX LAW § 420-b	exempting from property taxation (but subject to the discretion of local authorities) real property owned by organizations devoted exclusively for Bible, benevolent, missionary, literary, and other particular charitable purposes
N.Y. REAL PROP. TAX LAW § 420-c	exempting from property taxation real property dedicated to provide low-income housing
N.Y. REAL PROP. TAX	exempting from property taxation real property owned by corporations

Statute	Description
LAW § 430	organized for the purpose of establishing interdenominational centers
N.Y. REAL PROP. TAX LAW § 436	exempting from property taxation certain real property held in trust by a clergyman for the benefit of the members of his church
N.Y. REAL PROP. TAX LAW § 460	exempting from property taxation, up to $1500, certain real property owned by clergy of advanced age or impaired health
N.Y. REAL PROP. TAX LAW § 462	exempting from property taxation certain property owned by religious corporations for residential purposes
N.Y. TAX LAW § 186-a	exempting from excise taxation on utility services certain utility services transmitted or distributed to religious, educational, or other charitable organizations
N.Y. TAX LAW § 424(5)	exempting from excise taxation on alcoholic wine sold to a church or religious organization for religious purposes
N.Y. TAX LAW § 434	permitting a reimbursement of cash from the state to a church or religious organization for any tax paid on alcohol pursuant to N.Y. Tax Law § 424
N.Y. TAX LAW § 606(t), (x),	providing for a credit against income taxation for college tuition expenses paid to any institution of higher

Statute	Description
(oo)	education, for ownership of eligible low-income family residences, and for the rehabilitation expenses of certain historic structures
N.Y. TAX LAW § 615	deducting from the calculation of income tax most federal itemized deductions, including the deduction for charitable donations described by 26 U.S.C. § 170
N.Y. TAX LAW § 1116(a)(4)	exempting from sales and use taxation religious, educational, and other charitable organizations
N.Y. TAX LAW §§ 1202-a(5)(c) – 1202-aa(5)(c)	exempting from local hotel use taxation any transaction by or with religious, educational, or other charitable organizations
N.Y. TAX LAW § 1230	exempting from certain local taxation religious, educational, and other charitable organizations
N.Y. TAX LAW § 1453	deducting from the calculation of franchise tax on banking corporations the value of charitable donations described by 26 U.S.C. § 170 (which includes donations to religious organizations)
NORTH CAROLINA	
N.C. GEN. STAT. § 105-40	exempting from excise taxation certain exhibitions produced for the benefit of religious purposes

Statute	Description
N.C. GEN. STAT. § 105-125	exempting from corporate franchise taxation religious, educational, and other charitable corporations
N.C. GEN. STAT. §§ 105-129.35, 105-129.36	providing for a credit against income taxation for the rehabilitation expenditures of certified historic structures
N.C. GEN. STAT. § 105-130.9	deducting from the calculation of corporate income tax the value of certain charitable contributions described by 26 U.S.C. § 170(c) (which includes religious organizations)
N.C. GEN. STAT. § 105-130.11(a)	exempting from corporate income taxation corporations organized for religious, educational, or other charitable purposes
N.C. GEN. STAT. § 105-134.1(16)	deducting from the calculation of income tax all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes donations to religious organizations)
N.C. GEN. STAT. § 105-151.11	providing for a credit against income taxation for dependent childcare expenses described by 26 U.S.C. § 21 (which includes care rendered in churches and by religious organizations)

Statute	Description
N.C. GEN. STAT. § 105-151.26	deducting from the calculation of income tax the value of qualifying charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
N.C. GEN. STAT. § 105-164.13(26), (28), (31), (31a)	exempting from sales taxation the sale of food by private schools, newspapers, sales of meals by religious and other charitable organizations, and food sold by a church or religious organization when the proceeds are used for religious purposes
N.C. GEN. STAT. § 105-278.3(a)	exempting from property taxation buildings and certain surrounding land owned and used for religious purposes or occupied gratuitously by a non-owner for religious, educational, or other charitable purposes
N.C. GEN. STAT. § 105-278.3(b)	exempting from property taxation personal property used by its owner for religious purposes or gratuitously made available to a non-owner for religious, educational, or other charitable purposes
N.C. GEN. STAT. § 105-278.3(c)	exempting from property taxation the property of congregations, parishes, and similar bodies of religious congregations and

Statute	Description
	conferences thereof
N.C. GEN. STAT. § 105-278.4	exempting from property taxation certain real property of educational institutions and personal property of churches or religious bodies if used for educational purposes
N.C. GEN. STAT. § 105-278.5	exempting from property taxation certain real and personal property of religious educational assemblages
N.C. GEN. STAT. § 105-278.6	exempting from property taxation real property owned by orphanages and monasteries
NORTH DAKOTA	
N.D. CENT. CODE § 57-02-08	exempting from property taxation the property of schools and dormitories operated by religious corporations for educational purposes, houses used exclusively for public worship, parsonages, all buildings belonging to institutions of public charity owned by religious or charitable institutions described by 26 U.S.C. § 501(c)(3), all real property owned by religious corporations on which there is a building used for the religious services of the corporation, and group homes owned by nonprofit organizations described by 26 U.S.C. § 501(c)(3)

Statute	Description
N.D. CENT. CODE § 57-02-26	exempting from property taxation property leased for a term of years or under contract for sale to a religious, scientific, or benevolent society
N.D. CENT. CODE § 57-35.3-02	deducting from the calculation of income tax the value of certain charitable donations (including donations to religious organizations), defined with reference to 26 U.S.C. § 170
N.D. CENT. CODE § 57-35.3-05	providing for a credit against excise taxation on financial institutions for charitable donations to nonprofit private schools
N.D. CENT. CODE § 57-38-01.7	providing for a credit against corporate income taxation of up to 50% of the value of charitable donations to certain private schools
N.D. CENT. CODE § 57-38-01.21	providing for a credit against income taxation for certain planned gifts to qualified nonprofit organizations, defined with reference to 26 U.S.C. §§ 170, 501(c) (which include religious organizations)
N.D. CENT. CODE § 57-38-09	exempting from income taxation organizations exempt under the Internal Revenue Code of 1954 (which includes religious and educational organizations)
N.D. CENT. CODE §	exempting from sales taxation gross receipts from educational, religious,

Statute	Description
57-39.2-04(4), (5), (25)	or charitable activities totaling less than $5000, sales of textbooks to students of private schools, sales of newsprint ink for use in the publication of a newspaper, and sales of Bibles, hymnals, and other books sold to nonprofit religious organizations
N.D. CENT. CODE § 57-40.2-04(3), (6), (11)	exempting from use taxation motor vehicles exempt from taxation under N.D. CENT. CODE § 57-40.3-04, newsprint ink used in publication of a newspaper, Bibles, hymnals, and other books used by nonprofit religious organizations
N.D. CENT. CODE § 57-40.3-04(10), (14)	exempting from motor vehicle excise taxation motor vehicles used by any religious or private school to transport students and motor vehicles acquired by a charitable organization to be awarded in a raffle
OHIO	
OHIO REV. CODE ANN. § 718.01(H)(2)	excluding from municipal income taxation the income of religious, educational, and other charitable organizations
OHIO REV. CODE ANN. § 2113.86	exempting from equitable apportionment for the purposes of estate taxation any interest allowable as a charitable deduction

Statute	Description
	for estate tax purposes (which includes interests granted to religious organizations)
OHIO REV. CODE ANN. § 5701.13	exempting certain homes for the aged owned by certain religious or charitable organizations from taxation
OHIO REV. CODE ANN. § 5709.04	exempting from property taxation the intangible property of religious, educational, and other charitable organizations
OHIO REV. CODE ANN. § 5709.07	exempting from property taxation houses of worship and certain tangible property therein, the real property owned by a church used for retreats or camping, and buildings under the control of organizations described by 26 U.S.C. § 501(c)(3)
OHIO REV. CODE ANN. § 5709.12	exempting from property taxation real property held by organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations) for the purpose of constructing or rehabilitating residences for low-income families
CODE ANN. § 5709.121(A)(1)(b)	defining real and tangible property owned by an educational institution and used for educational purposes to be "charitable"
OHIO REV. CODE ANN. §	exempting from income taxation the net income of property used for the

Statute	Description
5709.13	support of homes for poor children
OHIO REV. CODE ANN. § 5731.17	deducting from the calculation of estate tax the value of all transfers to religious, educational, and other charitable organizations
OHIO REV. CODE ANN. § 5733.37	providing for a credit against corporate franchise taxation for the provision of a child care center for the benefit of employees
OHIO REV. CODE ANN. § 5733.38	providing for a credit against corporate franchise taxation for reimbursement of employees' child care expenses
OHIO REV. CODE ANN. § 5733.47	providing for a credit against corporate franchise taxation for rehabilitating historic buildings
OHIO REV. CODE ANN. § 5739.02(B)(3), (4), (9), (12), (13)	exempting from sales taxation sales of food sold to students in a private or private religious school, sales of newspapers and magazine subscriptions, sales of certain services or tangible property by or to churches and other charitable organizations (including those described by 26 U.S.C. § 501(c)(3)), building materials and services sold to a construction contractor for incorporation into a house of worship, facility for religious education, or for certain charitable organizations (including those

Statute	Description
	described by 26 U.S.C. § 501(c)(3))
OHIO REV. CODE ANN. § 5751.01(E)	exempting from a gross receipts excise tax any charitable contributions received
OKLAHOMA	
OKLA. STAT. tit. 68, § 1356(6), (7), (11), (12), (13), (27), (29), (65)	exempting from sales taxation dues paid to certain nonprofit religious, educational, or other charitable organizations by its members, certain sales of tangible property to or by churches or other organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations), sales of tangible property or services to certain private schools, tuition and fees paid to certain private schools, sales of property made by certain private schools and related student or parent groups, sales of tangible property or services to children's homes or youth camps supported or sponsored by churches, and sales of boxes of food by a church or charitable organization described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
OKLA. STAT. tit. 68, § 1357(15)	exempting form sales taxation sales of tangible property or services to children's homes located on church property

Statute	Description
OKLA. STAT. tit. 68, § 1364(k)	exempting from excise taxation on special events those events sponsored by private schools and church organizations described by 26 U.S.C. § 501(c)(3)
OKLA. STAT. tit. 68, § 1364.2(K)	exempting from excise taxation on certain "special events" any event sponsored by a church organization described by 26 U.S.C. § 501(c)(3)
OKLA. STAT. tit. 68, § 1503.1	exempting from excise taxation on certain coin-operated devices all such devices owned by and operated in a private religious school or church or which dispense only newspapers or periodicals
OKLA. STAT. tit. 68, §§ 2353(10), (12), 2355(A)	deducting from the calculation of income tax all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 501(c)(3) (which includes contributions to religious organizations)
OKLA. STAT. tit. 68, § 2357.26	proving for a credit against income taxation for an employer's eligible expenses for the provision of child care services to employees
OKLA. STAT. tit. 68, § 2359	exempting from income taxation organizations described by 26 U.S.C. § 501(c) (which includes religious organizations)
OKLA. STAT.	excluding from the definition of

Statute	Description
tit. 68, § 2385.1	"wages" for the purpose of income tax withholding requirements amounts for services paid by a minster in the exercise of his ministry or by members of a religious order in the exercise of the duties of that order
OKLA. STAT. tit. 68, § 2887(7), (9), (11)	exempting from property taxation all property used exclusively for religious purposes, certain property used exclusively for charitable purposes, and all libraries and office equipment of ministers where such property is used for ministerial work
OREGON	
OR. REV. STAT. § 307.140(1)	exempting from property taxation all houses of worship, buildings used solely for charitable purposes by religious organizations, underlying land and furniture within
OR. REV. STAT. § 307.145	exempting from property taxation child care facilities, schools, and student housing owned by religious organizations when such buildings are used for educational purposes
OR. REV. STAT. § 307.541	exempting from property taxation certain low income housing owned by charitable organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations) and used for

Statute	Description
	charitable purposes described by 26 U.S.C. § 501(c)(3) (which includes religious purposes)
OR. REV. STAT. § 315.204	providing for a credit against income taxation for reimbursement of employees' child care expenses
OR. REV. STAT. § 315.208	providing for a credit against income taxation for certain expenses paid by employers to construct, acquire, or renovate property so that it may provide a dependent care facility
OR. REV. STAT. §§ 315.237, 348.618	providing for a credit against income taxation for certain scholarship payments made by employers for the benefit of the dependents of employees who are enrolled in private schools
OR. REV. STAT. § 315.262	providing for a credit against income taxation equal to a percentage of qualified taxpayers' child care expenses
OR. REV. STAT. §§ 316.012, 316.048	deducting from the calculation of income tax all federal deductions, including the deduction described by 26 U.S.C. § 170 for donations to religious and other charitable organizations
OR. REV. STAT. § 316.162(2)(i)	excluding from the definition of "wages" for income tax withholding purposes any remuneration paid to a minister in the exercise of his

Statute	Description
	ministry or to the members of a religious order in their exercise of the duties of that order
OR. REV. STAT. § 317.080(1)	exempting from corporate excise taxation organizations described by 26 U.S.C. § 501(c) (which includes religious organizations)
OR. REV. STAT. § 317.151	providing for a credit against corporate excise taxation for charitable contributions to educational institutions described by 26 U.S.C. § 170(b)(1)(A)(ii) (which includes religious educational institutions)
OR. REV. STAT. § 320.173(1), (5)	exempting from excise taxation on construction improvements to private schools and religious facilities primarily used for worship or religious education
OR. REV. STAT. § 320.308(5)	exempting from excise taxation on transient lodging dwelling units at a nonprofit youth or church camp
PENNSYLVANIA	
10 PA. CONS. STAT. § 375	defining the "advancement of religion" as a charitable purpose for the purposes of being designated as a "public charity"
20 PA. CONS. STAT. § 3702	excluding from equitable apportionment of federal estate tax the interests of an estate allowable as a deduction under 26 U.S.C. §

Statute	Description
	2055 (which includes religious uses)
53 PA. CONS. STAT. § 6924.301.1(f)(7)	exempting from taxes imposed by local tax assessors certain activities of religious and other charitable organizations
53 PA. CONS. STAT. § 6924.303	exempting from payroll taxation organizations described by 10 PA. CONS. STAT. § 375 (which includes organizations that further the advancement of religion), except to the extent that such organizations earn "unrelated business income" described by 26 U.S.C. § 511
53 PA. CONS. STAT. § 7108	exempting from municipal property taxation and municipal claims all houses of worship and institutions of "purely public charity"
53 PA. CONS. STAT. §§ 23126, 37601	exempting from municipal license taxation certain facilities designated for religious, educational, or charitable purposes
72 PA. CONS. STAT. §§ 3244, 3250-10	exempting from property taxation certain charitable and religious organizations
72 PA. CONS. STAT. § 3402-311	exempting from income taxation amounts in excess of 90% of total income given each year for 10 years to certain religious and other charitable organizations
72 PA. CONS.	exempting from certain personal property taxation religious and other

Statute	Description
STAT. § 4821	charitable organizations
72 PA. CONS. STAT. § 5020-204	exempting from local taxation all churches and places of religious worship
72 PA. CONS. STAT. § 5453.202(a)(1), (3), (4)	exempting from local taxation all churches and other places of religious worship as well as the underlying land, hospitals, universities, colleges, schoolhouses
72 PA. CONS. STAT. § 7204(10), (28)	exempting from a sales tax designated exclusively to benefit public education sales of religious publications and Bibles and sales at retail to (or use by) any charitable organization, nonprofit educational institution, or religious organization for religious purposes
72 PA. CONS. STAT. § 8705-F	providing for a credit against corporate taxation for contributions to scholarship organizations or educational improvement organizations
72 PA. CONS. STAT. § 9111	exempting from transfer taxation transfers of property to religious and other charitable organizations
RHODE ISLAND	
R.I. GEN. LAWS § 3-10-1(b)	exempting from excise taxation on alcohol all wine sold for religious purposes directly to a clergy member

Statute	Description
R.I. GEN. LAWS § 44-3-3(5), (7), (8)	exempting from property taxation buildings for religious worship, intangible property held for or by religious and other charitable organizations, and buildings and personal property used as a school or seminary by a charitable organization
R.I. GEN. LAWS § 44-11-1(2)(iv)	exempting from excise taxation on corporations certain schools and colleges
R.I. GEN. LAWS § 44-14-13	deducting from the calculation of corporate income tax the value of contributions to religious and other charitable organizations
R.I. GEN. LAWS § 44-18-20(g)(2)	exempting from use taxation on certain tangible property certain sales organized by religious, educational or other charitable organizations
R.I. GEN. LAWS § 44-18-30	exempting from sales taxation receipts from the sale of newspapers (including religious periodicals), school meals (including meals served by private religious schools), sales to and use by certain charitable or religious organizations, and textbooks by "educational institutions"
R.I. GEN. LAWS §	exempting from estate taxation the value of any interest transferred to

Statute	Description
44-22-1(c)	organizations not subject to state tax or for the use of charitable purposes
R.I. GEN. LAWS § 44-23.1-5(e)	exempting from estate taxation any property passing to or in trust to any charitable organization
R.I. GEN. LAWS § 44-30-1(d)	exempting from income taxation organizations described by 26 U.S.C. § 501(a) (which includes religious organizations) and other entities exempt from federal income tax
R.I. GEN. LAWS § 44-30-2.6(a)	deducting from the calculation of income tax all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
R.I. GEN. LAWS § 44-30-25	exempting from income taxation the income earned by family education accounts designated to provide funds for post-secondary education
R.I. GEN. LAWS §§ 44-62-1, 44-62-2	providing for a credit against corporate taxation for contributions to qualified scholarships for students attending nonpublic schools, including private religious schools
SOUTH CAROLINA	
S.C. CODE ANN. §	exempting from corporate income taxation organizations described by

Statute	Description
12-6-580	26 U.S.C. § 501(a) (which includes religious organizations)
S.C. CODE ANN. §§ 12-6-1130, 12-6-5590	deducting from the calculation of income tax the value of certain donations to religious and other charitable organizations
S.C. CODE ANN. § 12-6-3385	providing for a refundable credit (up to $850) against income taxation for tuition paid to institutions of higher learning, including religious schools of higher learning, but excluding schools that have the sole purpose of providing religious or theological training
S.C. CODE ANN. § 12-6-3750	providing for a credit against income taxation for each deer carcass donated by a meat processor or butcher to charitable institutions engaged in donating food to the needy
S.C. CODE ANN. § 12-8-520	exempting from income tax withholding requirements wages paid to ministers in exercise of the ministry or to members of a religious order in the exercise of their duties
S.C. CODE ANN. § 12-21-2420	exempting from admissions excise taxation certain admission fees charged by religious, educational, and other charitable organizations
S.C. CODE	exempting from sales taxation sales of textbooks, magazines, and similar

Statute	Description
ANN. § 12-36-2120	items used in the course of study, religious publications, meals for sale in schools or by nonprofit organizations that receive only charitable contributions, and certain concession sales at festivals run by charitable organizations if the proceeds of such festivals go to benefit charitable functions
S.C. CODE ANN. § 12-37-220	exempting from property taxation the property of all schools, certain charitable institutions, churches (and certain surrounding lands), parsonages, charitable trusts and foundations, and the property of any religious corporation if used to conduct meetings or the business of the corporation
SOUTH DAKOTA	
S.D. CODIFIED LAWS § 10-4-9	exempting from property taxation property used for religious purposes and certain property owned by religious associations
S.D. CODIFIED LAWS § 10-4-9.1	exempting from property taxation property used for charitable purposes and owned by public charities (defined with reference to 26 U.S.C. 501(c)(3) (which includes religious organizations))
S.D. CODIFIED	exempting from property taxation

Statute	Description
LAWS § 10-4-9.2	property owned by certain benevolent educational associations used for benevolent purposes
S.D. CODIFIED LAWS § 10-4-10	exempting from property taxation certain agricultural land owned by charitable, educational, or religious societies used for charitable or benevolent purposes
S.D. CODIFIED LAWS § 10-4-13	exempting from property taxation certain educational institutions
S.D. CODIFIED LAWS § 10-40-23	exempting from estate transfer taxation property transferred to religious societies, nonprofit foundations, churches, schools, and other charitable organizations
S.D. CODIFIED LAWS § 10-45-5.6	exempting from a license tax certain tax exempt organizations (defined by 26 U.S.C. § 501(c)(3)) that devote their resources exclusively to the use of the poor (including religious associations dedicated to helping the poor)
S.D. CODIFIED LAWS § 10-45-10	exempting from sales taxation sales to tax exempt organizations (defined by 26 U.S.C. § 501(c)(3)) that devote their resources exclusively to the use of the poor
S.D. CODIFIED LAWS §	exempting from sales taxation the gross receipts of certain religious and other charitable activities

Statute	Description
10-45-13	
S.D. Codified Laws § 10-45-14	exempting from excise taxation on retail sales the gross receipts from sales of personal property or services to or for use by religious educational institutions
S.D. Codified Laws § 10-45D-8	exempting from excise taxation on gross receipts certain receipts from the rental of space at lodging establishments and campsites owned by nonprofit religious and educational institutions
S.D. Codified Laws § 10-45D-15	exempting from use taxation certain forms of energy sold to religious educational institutions and nonprofit hospitals
S.D. Codified Laws § 10-46-15	exempting from use taxation the gross receipts from the sales of personal property or utilities services to or for use by religious educational institutions
S.D. Codified Laws § 35-1-8.1	exempting from excise taxation on alcohol the purchase and sale of wine to members of the clergy for religious purposes
Tennessee	
Tenn. Code Ann. § 57-4-301(e)	exempting from excise taxation on alcohol certain sales of alcohol by charitable organizations
Tenn. Code	exempting from income taxation the

Statute	Description
ANN. § 67-2-104	income from the stocks and bonds of educational, religious, and other charitable institutions and similar income irrevocably set aside by others for religious and other charitable uses
TENN. CODE ANN. § 67-4-1906	exempting from excise taxation on rental cars rentals to churches and religious organizations described by 26 U.S.C. § 501(c)(3)
TENN. CODE ANN. § 67-4-2006	deducting from net earnings and net losses for the purpose of calculating excise tax the value of charitable contributions (including to religious organizations)
TENN. CODE ANN. § 67-5-207	exempting from property taxation the property of certain charitable institutions (defined with reference to 26 U.S.C. § 501(c)(3), which includes religious organizations) that use such property to provide low-income housing
TENN. CODE ANN. § 67-5-212	exempting from property taxation property owned by religious and other charitable organizations
TENN. CODE ANN. § 67-5-221	exempting from property taxation certain property owned by charitable institutions for the purpose of constructing single family low-income dwellings
TENN. CODE	exempting from property taxation

Statute	Description
ANN. § 67-5-222	historic properties owned by charitable institutions
TENN. CODE ANN. § 67-6-322(a), (b)	exempting from sales and use taxation tangible property sold or services rendered to churches, schools, and other organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
TENN. CODE ANN. § 67-8-103	exempting from gift taxation the transfers of any interest to religious, educational, or other charitable purposes
TENN. CODE ANN. § 67-8-315	deducting from the calculation of inheritance tax the value of certain interests in property transferred for certain religious or other charitable uses
TEXAS	
TEX. ALCO. BEV. CODE ANN. § 109.51	prohibiting the imposition of tax on the sale or use of wine for religious purposes
TEX. TAX CODE ANN. § 11.18	exempting from property taxation the property of certain charitable organizations, including religious organizations
TEX. TAX CODE ANN. § 11.181	exempting from property taxation the property of certain charitable organizations, including religious organizations, that provide low

Statute	Description
	income housing
TEX. TAX CODE ANN. § 11.20	exempting from property taxation certain real and tangible property, including certain parsonages, of religious organizations
TEX. TAX CODE ANN. § 11.21	exempting from property taxation certain property used as and to operate a school
TEX. TAX CODE ANN. § 151.310	exempting from sales, excise, and use taxation items sold or consumed by religious, educational, or other charitable organizations and other organizations described by 26 U.S.C. § 501(c)(3)
TEX. TAX CODE ANN. § 151.3101(a)(5)	exempting from excise taxation on amusement certain amusement services provided by religious, educational, or other charitable organizations
TEX. TAX CODE ANN. § 151.312	exempting from sales, excise, and use taxation publications by certain charitable organizations, including religious organizations
TEX. TAX CODE ANN. § 151.314(d)	exempting from sales taxation certain food products, not otherwise exempt, if served by a private school, sold by a church, or at a church function
TEX. TAX CODE ANN. §	exempting from motor vehicle use taxation the sale, use, or rental receipts of a motor vehicle used for

Statute	Description
152.088	religious purposes
TEX. TAX CODE ANN. § 156.102	exempting from excise taxation on hotel rooms religious, educational, and other charitable organizations
TEX. TAX CODE ANN. §§ 171.058, 171.062, 171.063	exempting from franchise taxation on organizations doing business in Texas "purely public charities," organizations described by 26 U.S.C. § 501 (c)(3) (which includes religious organizations), and other organizations organized for the purpose of religious worship
UTAH	
UTAH CODE ANN. § 59-2-1101(3)(d)	exempting from property taxation property owned by nonprofit organizations and used for religious, educational, or other charitable purposes
UTAH CODE ANN. § 59-7-109	deducting from the calculation of corporate income tax the value of certain charitable contributions described by 26 U.S.C. § 170
UTAH CODE ANN. § 59-8-103(4)	exempting from excise taxation on corporate gross receipts certain religious or charitable organizations
UTAH CODE ANN. § 59-10-202(g)	deducting from the calculation of estate and trust income tax the revenue earned from assets set aside for charitable purposes described by 26 U.S.C. § 642(c) (which includes

Statute	Description
	interests set aside for religious purposes)
UTAH CODE ANN. § 59-10-1006	providing for a credit against income taxation for expenses incurred for rehabilitation or preservation of historic property
UTAH CODE ANN. § 59-12-104(12)	exempting from sales taxation sales of certain foods by a church, charitable institution, or institution of higher learning
UTAH CODE ANN. § 59-12-104.1	exempting (sometimes *ex post* in the form of a refund) from sales and use taxation certain sales made by or to religious or charitable institutions
VERMONT	
VT. STAT. ANN. tit. 32, § 3802	exempting from property taxation property set aside for "pious or charitable uses," real property owned by churches or church societies, and parsonages
VT. STAT. ANN. tit. 32, § 5830c	providing for a credit against income taxation for charitable investments in low-income housing
VT. STAT. ANN. tit. 32, § 5811(18)	deducting from the calculation of income tax all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)

Statute	Description
VT. STAT. ANN. tit. 32, § 5811(18)(D)	excluding from income taxation organizations described by 26 U.S.C. § 501(a) and other organizations exempt from federal income taxation
VT. STAT. ANN. tit. 32, § 5825a	providing for a credit against income taxation for contributions to a higher education investment plan
VT. STAT. ANN. tit. 32, § 5828c	providing for a refundable credit against income taxation for child and dependent care expenses described by 26 U.S.C. § 21 (which applies to care rendered in churches and by religious organizations)
VT. STAT. ANN. tit. 32, § 5830c	providing for a credit against income taxation for contributions to eligible housing charities, defined to include nonprofit organizations dedicated to providing affordable housing
VT. STAT. ANN. tit. 32, § 7305(e)	exempting from equitable apportionment for estate tax purposes the value of any interest passing to or in trust for any charitable purpose
VT. STAT. ANN. tit. 32, § 8911(3)	exempting from excise taxation on motor vehicles any vehicle owned or leased by religious or other charitable institutions
VT. STAT. ANN. tit. 32, § 9202(10)(D)(ii)(VII)	exempting from excise taxation on certain food items food sold by nonprofit organizations at church suppers or similar events

Statute	Description
VT. STAT. ANN. tit. 32, § 9743	exempting from sales taxation sales to or by organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
VIRGINIA	
VA. CODE ANN. § 15.2-912.2	exempting from local taxation the proceeds of charitable gaming
VA. CODE ANN. § 58.1-401	exempting from corporate income taxation certain religious, educational, and other charitable organizations described by 26 U.S.C. 501(c)
VA. CODE ANN. § 58.1-609.10	exempting from sales and use taxation personal property bought by churches for use in religious worship or in carrying out the work of the church
VA. CODE ANN. § 58.1-609.11	exempting from sales and use taxation sales by and to certain nonprofit organizations and other organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
VA. CODE ANN. § 58.1-11(A)(2), (C)(6)	exempting from recordation taxation deeds conveying real estate to churches or religious bodies to be used for religious purposes or as a ministerial residence and deeds conveying real estate from the trustees of certain churches or

Statute	Description
	religious bodies
VA. CODE ANN. § 58.1-811(B)(2)	exempting from recordation taxation deeds of trust or mortgage given by trustees of certain churches or religious bodies
VA. CODE ANN. § 58.1-1505	exempting from excise taxation on aircraft any aircraft sold to certain organizations described by 26 U.S.C. § 501(c)(3) (which includes religious organizations)
VA. CODE ANN. § 58.1-3203	exempting from property taxation certain charitable lessee organizations (described by 26 U.S.C. § 501(c) (which includes religious organizations)) that would otherwise treated like owners of the property for tax purposes
VA. CODE ANN. § 58.1-3606	exempting from property taxation real and personal property owned by churches or religious bodies, parsonages, and certain religious organizations
VA. CODE ANN. §§ 58.1-3609, 58.1-3617	exempting from property taxation the property of certain charitable organizations, including religious organizations, churches, and religious associations
VA. CODE ANN. § 58.1-3833	exempting from sales taxation on food and beverages such items sold by churches, religious bodies, educational and other charitable

Statute	Description
	organizations
VA. CODE ANN. § 58.1-3840	exempting from excise taxation on meals certain such items sold by churches, religious bodies, or educational and other charitable organizations
VA. CODE ANN. § 58.1-439.6	providing for a credit against corporate income taxation for retraining employees
VA. CODE ANN. § 58.1-439.4	providing for a credit against corporate income taxation for investment in construction, renovation, and acquisition of day-care facilities
WASHINGTON	
WASH. REV. CODE § 82.04.339	exempting from excise taxation revenue from daycare facilities operated by organizations described by WASH. REV. CODE § 84.36.020 (which includes churches)
WASH. REV. CODE § 82.04.36651	exempting from excise taxation revenue from fundraising activities by nonprofit organizations, defined with reference to 26 U.S.C. § 501(c)(3) (which includes religious organizations)
WASH. REV. CODE § 82.04.4264	exempting from excise taxation revenue received by certain nonprofit boarding homes described by 26 U.S.C. § 501(c)(3) (which

Statute	Description
	includes religious organizations)
WASH. REV. CODE § 82.04.4271	deducting from the calculation of excise tax the value of membership fees received by nonprofit youth organizations exempt from property taxation under WASH. REV. CODE § 84.36.030 (which includes certain religious organizations)
WASH. REV. CODE § 82.12.02595	exempting from use taxation the donation (and use) of property or certain services to (and by) nonprofit charitable organizations
WASH. REV. CODE § 82.12.800(1)(d)	exempting from use taxation for sea vessels certain vessels loaned or donated to religious or other charitable organizations
WASH. REV. CODE § 84.33.075	exempting from excise taxation on timber any timber harvested from its own land by nonprofit organizations defined by WASH. REV. CODE § 84.36.030 (which includes certain religious organizations)
WASH. REV. CODE § 84.36.020	exempting from property taxation all churches, parsonages, convents, certain surrounding lands
WASH. REV. CODE § 84.36.030(2), (3)	exempting from property taxation property owned by a church or association of churches if used as a camp facility and property owned by nonprofit organizations engaged in character building of children

Statute	Description
WASH. REV. CODE § 84.36.032	exempting from property taxation the property of the administrative offices of a religious organization
WASH. REV. CODE § 84.36.050	exempting from property taxation property owned or used by or for any nonprofit school
WEST VIRGINIA	
W. VA. CODE § 8-13-5(d)	exempting from municipal excise taxation religious and other charitable organizations, except to the extent of unrelated business income taxation described by 26 U.S.C. § 511
W. VA. CODE § 11-3-9	exempting from property taxation property used for religious worship, parsonages, certain mortgages and bonds sold by churches and religious societies, and certain other property used for charitable purposes
W. VA. CODE § 11-13-3(b)(4)	exempting from excise taxation on business certain religious or other charitable organizations
W. VA. CODE § 11-15-9(a)(6)	exempting from sales taxation sales to certain organizations described by 26 U.S.C. § 501(c)(3), including churches
W. VA. CODE § 11-15-11	exempting from sales taxation sales of certain services by organizations described by 26 U.S.C. § 501(c)(3)

Statute	Description
	(which includes religious organizations)
W. VA. CODE § 11-21-3(d)	exempting from income taxation entities described by 26 U.S.C. § 501(a) (which includes religious organizations) or otherwise exempt from federal income taxation
W. VA. CODE § 11-21-15	deducting from the calculation of income tax most federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes donations to religious institutions)
W. VA. CODE §§ 11-24-3, 11-24-3a(44)	deducting from the calculation of corporate income taxation all federal itemized deductions, including the deduction for charitable contributions described by 26 U.S.C. § 170 (which includes contributions to religious organizations)
W. VA. CODE § 11-24-5(a)	exempting from corporate income taxation corporations described by 26 U.S.C § 501(a) (which includes religious corporations) or otherwise exempt from federal income taxation
W. VA. CODE § 47-21-7	exempting from license taxation on charitable raffles any charitable or public service organization

Statute	Description
Wisconsin	
Wis. Stat. § 70.11(4), (4a), (11)	exempting from property taxation certain property owned and used by churches, religious, educational, or benevolent associations, Bible camps, benevolent associations used as low-income housing
Wis. Stat. § 71.07(5r)	providing for a credit against income taxation for tuition payments to certain 4-year colleges
Wis. Stat. § 71.26(1)(a)	exempting from income taxation all religious and educational organizations
Wis. Stat. § 71.28(5k)	providing for a credit against corporate income taxation for contributions to community rehabilitation programs that provide or facilitate vocational services to individuals with disabilities
Wis. Stat. § 71.63(6)(f)	excluding from the definition of "wages" for income tax withholding purposes the remuneration paid for the services of a minister in the exercise of his ministry or the members of a religious order in the satisfaction of the duties of that order
Wis. Stat. § 77.54(9), (9a)(f)	exempting from sales taxation the sales of tickets or admissions to private school activities where the

Statute	Description
	proceeds are used for educational, religious, or charitable purposes and for certain other charitable organizations, including religious organizations
WYOMING	
WYO. STAT. ANN. § 39-11-105(a)(vii), (xix), (xxv)	exempting from property taxation real property used for religious worship, church schools, parsonages, properties of charitable trusts, and the property of nonprofit schools
WYO. STAT. ANN. § 39-15-105(a)(iv)(B)-(C), (viii)(C)-(D)	exempting from sales taxation sales to religious or charitable organizations, occasional sales by religious or charitable organizations for the purpose of fund raising, and sales of newspapers and annual school publications
WYO. STAT. ANN. § 39-16-105(a)(iv)	exempting from excise taxation purchases by religious or charitable organizations in the conduct of their functions
DISTRICT OF COLUMBIA	
DC CODE § 47-902	exempting from property transfer taxation those properties described by DC CODE § 47-1002 (which includes church and certain religious property)
DC CODE § 47-1002(13)-	exempting from property taxation churches, buildings belonging to

Statute	Description
(16)	religious corporations, and pastoral and episcopal residences
DC CODE § 47-1508	exempting from property taxation certain charitable organizations, including religious organizations
DC CODE § 47-1802.01(3)	exempting from income taxation religious and other charitable organizations
DC CODE § 47-1803.03(a)(8)	deducting from the calculation of corporate income tax certain contributions to religious and other charitable organizations
DC CODE § 47-2005	exempting from sales taxation certain goods and items sold to "semipublic institutions" (defined by DC CODE § 47-2001 to include religious organizations)
DC CODE § 47-2820(b)	exempting from license taxation on certain entertainment such entertainment where the proceeds are intended to benefit churches or for charitable purposes

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 04 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, *et. al.*,
Respondents.

GALE GARRIOTT, in his official capacity as
Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE CATO INSTITUTE, ANDREW J. COULSON, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a state law giving tax credits to people who donate to scholarship organizations violate the Establishment Clause simply because some donors—as it happens, a declining majority—choose to fund scholarship programs affiliated with religious schools?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute, Foundation for Educational Choice, American Federation for Children, Council for American Private Education, Center for Education Reform, and Andrew J. Coulson have joined together to file this brief. A description of each of these *amici* follows. This case is of central concern to *amici* because it affects a broad range of educational tax credits and deductions at the state and national levels and because the freedom of choice in education would be seriously injured if this lawsuit succeeds.

The **Cato Institute** was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

The **Foundation for Educational Choice** was founded on the ideals and theories of Nobel Laureate economist Milton Friedman and economist Rose D. Friedman. The Foundation strives to educate parents, policymakers, and other organizations about the

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[1] In conformity with Supreme Court Rule 37, all parties have consented to the filing of this brief and letters of consent have been filed with the Clerk. *Amici* also state that no party's counsel authored this brief in whole or in part and no person or entities other than *amici*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

desperate need for a shift of power to the disenfranchised parents of America who have limited choices in the education of their children.

The **American Federation for Children** is a leading national advocacy organization promoting school choice, with a specific focus on school vouchers and scholarship tax credit programs. It seeks to improve our nation's K-12 education by advancing systemic and sustainable public policy that empowers parents, particularly those in low-income families, to choose the education they determine is best for their children. The Federation envisions a vibrant and successful education system where achievement is high and where low-income children are provided with equal opportunity to attend the finest schools possible, whether these schools are public, charter, or private.

The **Council for American Private Education** is a coalition of national organizations and state affiliates serving religious and independent elementary and secondary schools. Founded in 1971 to provide a coherent voice for private eduation, CAPE members and affiliates represent more than 80 percent of private school enrollment nationwide. CAPE's mission is to preserve and promote educational pluralism so that parents have a choice in their children's schooling. CAPE is dedicated to fostering communication and cooperation within the private school community and with the public sector to improve the quality of education for all children.

The **Center for Education Reform** is a national, independent, nonprofit advocacy organization founded in 1993 to advance substantive reforms in public

education. CER drives the creation of better educational opportunities for all children by leading parents, policymakers, and the media in advocating for school choice, advancing the charter school movement and challenging the education establishment. CER is an active broker in bridging policies and practices through coalition building and working with diverse constituencies to implement reforms that improve access, accountability, and assessment, to help restore excellence and equity in America's public schools.

Andrew J. Coulson directs the Cato Institute's Center for Educational Freedom and is author of *Market Education: The Unknown History* (Transaction Books, 1999), a comparative review of school systems from classical Greece to modern America, England, Canada, and Japan. He has also produced the most comprehensive worldwide review of the statistical research comparing alternative school systems (*Journal of School Choice*, Vol. 3, No. 1, 2009). Coulson has written extensively about education tax credit programs for many years.

STATEMENT OF THE CASE

Respondents allege that Arizona's Revised Statute § 43-1089 ("Section 1089") violates the First Amendment's Establishment Clause. Section 1089 provides citizens who voluntarily donate to school tuition organizations ("STOs") with a tax credit of up to $500 for individual taxpayers and up to $1000 for married couples filing jointly. Ariz. Rev. Stat. Ann. § 43-1089(A) (2010). An STO must use at least 90 percent of its annual revenue to provide educational

scholarships that allow children to attend a qualified private school of their parents' choosing. *Id.* § 43-1089(G)(3). An STO may limit the number of schools to which it provides such scholarships, so long as it provides them to more than one school. *Id.*

Initially, the district court dismissed the suit as barred by the Tax Injunction Act. The Ninth Circuit reversed, *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), and this Court affirmed, *Hibbs v. Winn*, 542 U.S. 88 (2004). On remand, the district court granted defendants' motion to dismiss for failure to state a claim under the Establishment Clause. The Ninth Circuit reversed, holding that "plaintiffs have alleged facts upon which a reasonable, informed observer could conclude that Section 1089, as applied, violates the Establishment Clause even though the state does not directly decide whether any particular sectarian organizations will receive program aid." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1023 (9th Cir. 2009) (panel). The Ninth Circuit subsequently denied rehearing *en banc*. *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009) (en banc).

SUMMARY OF ARGUMENT

Section 1089 has created numerous instances of "genuine and independent choice" that insulate the program from any Establishment Clause challenge. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). By nevertheless allowing such a challenge to go forward, the Ninth Circuit blatantly ignored this Court's precedent and harmed countless children's

educational opportunities. The Court here can thus preserve *stare decisis* by upholding the standard of "genuine and independent choice" in its Establishment Clause jurisprudence.

Most importantly, a taxpayer's choice of which STO to donate to—and whether to donate at all—is wholly within the discretion of that taxpayer. Any benefit to religious institutions is merely incidental to that choice. If left uncorrected, the Ninth Circuit's error will be widely cited and potentially invalidate not only the numerous education tax credit programs enjoyed by tens of thousands of students around the country, but also charitable tax deduction programs that serve millions of beneficiaries. The Ninth Circuit's faulty reasoning and plain misreading of this Court's jurisprudence jeopardizes each of these programs.

Far from advancing or endorsing religious education—via Section 1089 or otherwise—Arizona maintains a substantial financial disincentive to it. For example, parents receiving aid from an STO are typically required to spend several thousand dollars of their own money to send their children to religious schools. In contrast, tuition at both charter and regular public schools is free. Parents thus have a strong inducement *not* to choose a private religious institution over the secular, tuition-free public system.

Moreover, the Ninth Circuit's conclusion that parents in Arizona are pressured to accept scholarships to religious schools due to the limited number of scholarships available to secular schools is simply not supported by the evidence. In fact, the share of STO scholarships available for use at secular

schools is now *almost twice as large* as the share of families actually choosing secular schools. The percentage of scholarships reserved for religious schooling fell to 76 percent by 2004, and 65 percent in 2008. Andrew Coulson, *The Case of the Missing Evidence*, (Jan. 26, 2010), http://www.cato-at-liberty.org/2010/01/26/the-case-of-the-missing-evidence. Parents seeking scholarships for secular schooling for their children are thus not, in practice, at any disadvantage with respect to parents seeking scholarships for religious schooling.

Finally, programs like Section 1089 are necessary across the country to preserve parents' true choice in the education of their children. That is because the freedom to choose which STOs to support under Section 1089, and the freedom of each STO to focus its scholarship funds on certain schools, provides educational opportunities to a broad range of schools that many children would otherwise be unable to attend. Section 1089 fundamentally broadens the educational choice of Arizona parents and the educational opportunities of their children. This Court's precedent supports both of these goals.

ARGUMENT

1. This Court Should Uphold Section 1089 to Preserve Freedom of Educational Choice Across the Nation

Florida, Georgia, Indiana, Iowa, Pennsylvania and Rhode Island have programs like the one at issue here. All but Florida's are jeopardized by the Ninth Circuit

ruling because they, like Section 1089, allow STOs to serve religious constituencies on the same basis as secular ones. Pennsylvania's program alone served 44,000 students in 2007-08. Alliance for School Choice, *School Choice Yearbook: 2008-09*, at 51 (2009). And interest in these programs is growing: In 2009, 37 scholarship tax credit bills were introduced in state legislatures. The Foundation for Educational Choice, *2009 School Choice Legislation*, https://www.edchoice.org/School-Choice/Legislative-Round-Up/2009-School-Choice-Legislation.aspx (last visited August 2, 2010).

Because both the number of programs and the number of students served by each program have grown over the past decade, the long-term repercussions of this litigation will be profound. If current trends are allowed to continue, many hundreds of thousands of children nationwide will be served by programs like Arizona's in the next decade. But if the Ninth Circuit's ruling stands, it would not only curtail this growth but likely reverse it, as existing and potential donors would fear the tax implications of claiming credits that are subsequently struck down.

In short, the educational choices of tens of thousands of students in six states depend on the resolution of this case, as do the prospective choices of many more students in coming years.

II. Arizona's Law Involves a System of Genuine and Independent Private Choice That Insulates It From Establishment Clause Challenges

While Section 1089 does nothing to favor children attending religious schools, individual Arizonans have indeed donated the majority of their scholarship funds to religious STOs. Therefore, according to the Ninth Circuit, "Section 1089, as applied, 'fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children.'" *Winn*, 562 F.3d at 1018 (quoting *Zelman*, 536 U.S. at 655) (panel). That reasoning is flawed in several respects: first, it mistakenly applies Establishment Clause scrutiny to private choices; second, it proposes a distinction between tax credits and tax deductions that has no basis in law; and third, it invents a distinction between parent and taxpayer choice that is irrelevant to Establishment Clause analysis. Respondents' additional Establishment Clause arguments similarly misconstrue *Zelman* and other precedents and have no independent legal basis.

A. The Court Below Misapplied the Establishment Clause to Private Choices

In *Zelman*, this Court identified the existence of individual private choice as critical to an educational program's surviving Establishment Clause challenges. "[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice,

the program is not readily subject to challenge under the Establishment Clause." *Zelman*, 536 U.S. at 652. Much like the program this Court upheld in *Zelman*, Section 1089 fully complies with the requirement that any aid to religious schools be the result of genuine and independent private choice.

As Judge O'Scannlain recognized in his dissent to the Ninth Circuit's refusal to rehear this case *en banc*:

> Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally, parents need to apply for a scholarship for their student.

Winn, 586 F.3d at 662 (9th Cir. 2009) (en banc) (O'Scannlain, J., dissenting) (emphasis in original). In each of these layers, there is genuine and independent private choice insulating the program from any Establishment Clause challenge.

While the Ninth Circuit alleges that Section 1089 "creates incentives that pressure [secular-education-seeking] parents into accepting . . . scholarships [to] a religious school," *Winn*, 562 F.3d at 1018 (panel), the court failed to consider Arizona's numerous other educational programs.

As this Court noted in addressing the educational

program at issue in *Zelman*, "[t]he Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." 536 U.S. at 655-56 (emphasis in original).

In Arizona, as Judge O'Scannlain noted,

> [P]ublic schools must provide for open enrollment, allowing parents to send their children, tuition free, to schools of their choice. Tax credits are available for donations to public schools for "extracurricular activities or character education." An extensive system of charter schools "provide[s] additional academic choices for parents and pupils." Homeschooling is permitted and protected. Indeed Section 1089 itself offers parents yet another alternative: they can create their own STO and solicit donations for use at secular private schools.

Winn, 586 F.3d at 666 (en banc) (O'Scannlain, J. dissenting) (internal citations omitted).

Arizona provides its citizens a broad range of academic options, only one of which is to obtain an STO scholarship to attend a religious school. The Ninth Circuit thus erred in arguing that Arizona parents are pressured to send their children to religious schools.

B. The Court Below Created a Distinction Between Tax Credits and Tax Deductions That Lacks a Legal Basis

Petitioners argue that Section 1089 is essentially equivalent, for Establishment Clause purposes, to long-accepted federal tax deduction programs for charitable donations. The Ninth Circuit panel disagreed, positing that Section 1089 bears only a "superficial resemblance" to federal deductions and so does not partake of their Establishment Clause acceptability. *Winn*, 562 F.3d at 1015 (panel).

But Section 1089 resembles charitable deduction programs—far from superficially—in *all* the particular features essential to their constitutionality under the Establishment Clause. Of the two cases the Ninth Circuit cites to support its position, the first, *Hernandez v. Comm'r*, 490 U.S. 680 (1989), actually supports Petitioners' position and the second, *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983), is irrelevant.

Hernandez, in the course of ruling on the tax deductibility of a particular donation, reaffirmed the constitutionality of a provision, I.R.C. § 170 ("Section 170"), that allows deductions for charitable donations, including to "entities organized and operated exclusively for religious purposes." *Hernandez*, 490 U.S. at 683. The Court upheld Section 170 because it made no distinctions between different religious groups and satisfied the *Lemon* test. *Id.* at 695-96 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971), finding religious neutrality in both purpose and effect and avoidance of state entanglement with religion).

Section 1089 is even less problematic than Section 170 because it does not refer to religion at all—let alone distinguish among sects. And Respondents already conceded the first prong of the *Lemon* test—that the Arizona provision is facially neutral with respect to religion—turning this case into an as-applied challenge to the program's effects. *Winn*, 562 F.3d at 1007, n. 6 (panel). Yet Section 1089's primary effect is "encouraging gifts to charitable entities, including but not limited to religious organizations," which the *Hernandez* Court found "does not advance or inhibit religion." *Hernandez*, 490 U.S. at 696.

Finally, the Arizona Department of Revenue's ("ADOR") interactions with religious organizations under Section 1089 are comparable to those of the IRS under Section 170. The IRS's bookkeeping responsibility is merely "routine regulatory interaction which involves no inquiries into religious doctrine . . . no delegation of state power to a religious body . . . and no detailed monitoring and close administrative contact between secular and religious bodies . . . [and thus] does not of itself violate the nonentanglement command." *Id.* at 696-97 (internal citations and quotation marks omitted). Similarly, the ADOR must only determine that STOs use a certain percentage of their revenues on scholarships for K-12 schooling and collect certain data (*e.g.*, number of donations received, total value of donations, etc.). Section 1089 thus creates no doctrinal or other potentially church-state-entangling responsibilities.

In short, Section 1089 possesses all the features the Court deemed necessary to Section 170's survival under the Establishment Clause—and so *Hernandez*

undermines the Ninth Circuit's contention that there is any fundamental difference between Section 1089 and federal charitable tax deduction programs.

The only other case the Ninth Circuit cited—without discussion or explanation—to distinguish Section 1089 from charitable deduction programs with respect to the Establishment Clause is *Regan*. 461 U.S. 540. *Regan*, however—an appeal from the denial of tax-exempt status by a group lobbying on federal taxation issues—has no relation to Establishment Clause challenges to government programs. Indeed the word "Establishment" is wholly absent from the case. The First Amendment aspects of *Regan* are limited to the Free Speech Clause, which no party contends is at issue here.

In sum, the Ninth Circuit can find no support in this Court's precedent—or other law—to distinguish Section 1089 from functionally equivalent programs that have been held constitutional. The lower court's analysis thus urges the absurd and untenable result of invalidating federal charitable tax deductions.[3]

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[3] Religious organizations have received more donations than any other type of charity; in 2008, they received 34.7 percent of all charitable contributions, compared to 13.3 percent for educational organizations. National Center for Charitable Statistics, *Quick Facts About Nonprofits* (2008), http://nccs.urban.org/ (follow "Quick facts & figures" hyperlink under "U.S. Nonprofit Sector" section) (last visited August 2, 2010). While the ultimate recipients of the donated funds—who may be seeking food, shelter, medical services, etc.—have their options circumscribed by taxpayer decisions, deductions for donations to religious charities have passed constitutional muster.

C. The Court Below Invented a Distinction Between Parent and Taxpayer Choice That Is Irrelevant to Establishment Clause Analysis

Finally, the choice of which STO to donate to—and the choice of whether to donate to an STO at all—remains at the taxpayers' sole discretion. The Ninth Circuit seems to apply to the free, private, ever-evolving choices of countless Arizona taxpayers the same constraints imposed on government decisions by the Establishment Clause. As the Arizona Supreme Court recognized in analyzing this very statute, however, "[t]he decision-making process is completely devoid of state intervention or direction and protects against the government 'sponsorship, financial support, and active involvement' that so concerned the framers of the Establishment Clause." *Kotterman v. Killian*, 972 P.2d 606, 614 (Ariz. 1999) (quoting *Waltz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970)).

Nonetheless, the Ninth Circuit attempts to distinguish the statutory scheme in Section 1089 by arguing that "unlike parents, whose choices directly affect their children, taxpayers have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons, such as the academic caliber of the schools to which an STO restricts aid, rather than for sectarian reasons . . . ." *Winn*, 562 F.3d at 1022 (panel). In doing so, the court not only ignores the aforementioned federal charitable tax deduction system which has been upheld as constitutional despite involving purely taxpayer choice—but provides no sound reason for accepting its characterization of taxpayer motivations. Indeed the

lower court's characterization is both untenable in theory and false in practice.

The same public that the Court claims to have no compelling interest in the broad-based secular education of all children is the one that created the existing broad-based secular public school system through its elected representatives, and that has consistently voted to increase its funding for generations. Over the past 40 years, Americans have chosen to increase spending on a k-through-12 education by a factor of four, after adjusting for inflation.[3] Given that public school levies in many parts of the country require a 60-percent margin of support to pass, this demonstrates the public's considerable and enduring support for the academic and practical preparation of all children.

Furthermore, it is widely recognized that a free, prosperous and harmonious republic depends on universal access to a broad-based education that fits children for both success in private life and participation in public life. Taxpayers thus have an

[3] To compute the average cost of a complete k-12 education for graduates in a given year, we sum that year's per-pupil spending figure with the corresponding figures for the preceding 12 years—yielding a 13-year (k-12) sum. The k-12 education of 1970 graduating seniors cost approximately $39,000, in 2009 dollars. The figure for 2009 graduating seniors was roughly $150,000. Inflation adjustment to 2009 dollars computed using the BLS inflation calculator. Missing year per-pupil spending values were linearly interpolated or extrapolated from the available data. Data were sourced from Thomas D. Snyder & Sally A. Dillow, *Digest of Education Statistics 2009*, Nat'l Center Educ. Stat. table 182 (2010), *available at* http://nces.ed.gov/pubs2010/2010013.pdf.

obvious self-interest in ensuring that their neighbors' children are capable of supporting themselves, so that they do not create a burden on the state—and hence on taxpayers—for their support.

It is therefore not surprising that voters consistently place education among their top priorities in public opinion polls.[4] We want our neighbors' children to succeed in life because it is in both our nature and our interests to want it.

To summarize, the court below offered neither reason nor evidence to support its claim that a taxpayer considering an STO donation would be any more likely than a parent to discount the importance of academics. Indeed, both logic and evidence confute its claim. There is thus no reason to accept the distinction the Ninth Circuit draws between taxpayers and parents on this subject.

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[4] *See, e.g.* Mark DiCamillo & Mervin Field, *Marginal Rate Jobs/The Economy, The State Budget Deficit, Education and Health Care as Top Issues in this Year's Governor's Race*, Field Research Corp. Poll #2334 (2010), *available at* http://www.field.com/fieldpollonline/subscribers/Rls2334.pdf; Lydia Saad, *Iraq and the Economy are Top Issues to Voters*, Gallop, Feb. 13, 2006, http://www.gallup.com/poll/104820/Iraq-Economy-Top-Issues-Voters.aspx; Memorandum from Lake Research Partners and The Tarrance Group to Interested Parties, *Recent Poll Findings on National Survey* (Oct. 23, 2006), *available at* http://www.publiceducation.org/pdf/Publications/National_Poll_2006_PEN_Public_Poll.pdf; Mark DiCamillo & Mervin Field, *Candidate Views on Education Considered Most Important Issue when Deciding Whom to Support for Governor*, Field Research Corp. Poll #2039 (2002), *available at* http://www.field.com/fieldpollonline/subscribers/Rls2039.pdf.

D. Respondents' Additional Establishment Clause Argument, Regarding the Scholarship Recipients' Financial Need, Misconstrues This Court's Precedent

Respondents, in their brief opposing certiorari, suggested an additional reason why Section 1089 ostensibly runs afoul of the Establishment Clause. They argued that this Court upheld the Cleveland program at issue in *Zelman* in part because the vouchers "were issued on the basis of financial need," Resp't Cert. Br. in Opp'n 1, and that Section 1089 lacks this constraint. But Respondents provide no legal argument in defense of their view. Indeed, no such argument *could* be provided—because the recipients' income was not integral to *Zelman*'s holding and is not material to Establishment Clause analysis. *Zelman*, 536 U.S. at 652–53; *see also Mitchell v. Helms*, 530 U.S. 793, 801–836(2000) (plurality opinion); *id.* at 836–68 (O'Connor, J., concurring in judgment).

Respondents further claimed that STOs award "most of [their] scholarships to the children of middle-class and wealthy parents," Resp't Cert. Br. in Opp'n 2, citing two newspaper stories. This claim too is legally immaterial, *Zelman*, 536 U.S. at 652–53, and moreover is contradicted by the evidence. For example, Baylor University economist Charles M. North last year reported to the Arizona legislature's Ad Hoc Committee on Private School Tuition Tax Credit Review that "at least 14 of the largest STOs place substantial emphasis (including six that place sole emphasis) on financial need in deciding on scholarship awards. These 14 STOs account for 18,452 (or 65.2

percent) of the 28,321 scholarships awarded in 2008. They also accounted for $37.6 million (or 69.5 percent) of the $54.1 million in scholarships awarded in 2008." Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, (Nov. 2009), http://www.azpolicy.org/sites/azpolicy.org/files/downloads/ArizonaSTOTaxCreditCMNorth.pdf.

In short, the Respondents have not identified a legal basis upon which to mount a successful Establishment Clause challenge to Section 1089.[5]

III. Arizona Does Not Promote Religious Education

This Court's precedent unambiguously holds that the actual share of students enrolled in religious schools under a neutral program of true private choice is immaterial to that program's constitutionality under the Establishment Clause. *See Zelman*, 536 U.S. at 639; and *Mueller v. Allen*, 463 U.S. 388 (1983). Even if we ignored that finding, however, Arizona most certainly does not favor religion.

As noted above, *all* available education programs must be considered when determining whether or not government is favoring religious instruction in violation of the Establishment Clause. *Zelman*, 536

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[5] Recent scholarship questions whether "as applied" Establishment Clause challenges are *ever* viable—because either a legislature in the first instance makes a "law respecting an establishment of religion" or it doesn't. *See, e.g.*, Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1263-68 (2010).

U.S. at 655-56. When we do this here, we find that, far from favoring religious instruction, Arizona maintains a substantial financial disincentive to it.

Arizona operates a system of district-based public schools and a network of semi-autonomous public charter schools, supports private school choice through Section 1089, and permits home-schooling. The 2008-09 breakdown of funding and participation for the first three categories is given in Table 1.[6]

Table 1 shows that the tax credits granted under Section 1089 are 185 times smaller in value than Arizona's expenditures on strictly secular district and charter schools. The number of children benefiting from the credits is 38 times smaller. The average scholarship size, $1,909, is less than one quarter the per-pupil funding available to students in charter schools, and roughly one fifth the funding available to traditional public school students. To put that last figure in perspective, a 2006 study by *amicus* Coulson

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[6] Table 1. Funding & Participation in Arizona K-12 Education

	District Schools	Charter Schools	Section 1089
Students	979,841	99,018	28,321
Total Expenditures	$9,239,346,175	$768,228,014	$54,063,195
Per Pupil Expenditures	$9,429	$7,758	$1,909

Created using data from Tom Horne, *Superintendent's Annual Report for Fiscal Year 2008-2009*, Vol. 1, at 47-48 (2010); Gale Garriott, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008* (2008).

found average day tuition at Arizona private schools to have been $4,398 during the 2004-05 school year ($4,923 in 2009 dollars). Andrew Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, Goldwater Institute, Policy Report No. 213 (2006).

A corollary to the above figures is that even parents who receive STO scholarships must typically spend several thousand dollars of their own money to send their children to religious schools. By contrast, both charter and district public schools are tuition-free. And as this Court said in *Zelman*:

> Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program . . . must co-pay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates . . . financial incentive[s] for parents to choose a sectarian school."

536 U.S. at 654 (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993)).

Given all the options Arizona parents have for their children's education—and the state's disproportionate support for secular ones—it is absurd to suggest that the state coerces them into choosing religious schools. *See* Tim Keller, Op-Ed., *Not An Endorsement of*

Religion, National Law Journal, Mar. 8, 2010, at 38.[7]

IV. Respondents Rely on a Moving Statistical Target That Has Never Supported Their Legal Argument

In *Mueller*, this Court said that it would "be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U.S. at 401. Applying this precedent in *Zelman*, the Court stated that:

> To attribute constitutional significance to [the local percentage of religious private schools] would lead to the absurd result that a neutral school-choice program might be permissible in some [places] . . . but not in [others] . . . . The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time,

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[7] Note also that the financial incentive argument raised by Justice Souter in his *Zelman* dissent, 536 U.S. at 705–706—an argument countered by the majority, 536 U.S. at 656 n.4—does not apply to Section 1089. The Cleveland program requires private schools to accept the voucher as full payment of tuition, and, given its comparatively low value, Justice Souter argued that this created a disincentive to the participation of (usually more expensive) secular private schools, biasing the program toward religion. Section 1089 imposes no such restriction on tuition charged by private schools, and so even if the Court now chose to accept Justice Souter's *Zelman* argument, it would not apply to the program at issue here.

> most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.

536 U. S. at 657-58.

The Ninth Circuit acknowledged this precedent, *see Winn*, 562 F.3d at 1018 n.14 (panel), but then chose to discount it, finding that, as Respondents allege,

> [T]he choice delegated to taxpayers under Section 1089 channels a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools. The scholarship program thus skews aid in favor of religious schools, requiring parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education.

Id. at 1013.

For the reasons described above, the Ninth Circuit's reasoning misuses Supreme Court precedent by improperly applying to the independent choices of taxpayers the Establishment Clause's restrictions on government religious bias—and by failing to consider Section 1089 in the context of the overwhelming predominance of secular education programs in the state. But what if we were to ignore precedent and to suppose that the distribution of scholarships reserved for religious education is constitutionally relevant? Would the lower court be correct in concluding that Section 1089 "skews aid in favor of religious schools,

requiring parents who would prefer a secular private school . . . to choose a religious school . . .”? *Id.*

The answer is no. A simple preponderance of scholarship availability for religious schools would not mean that parents seeking secular private schooling would be any less likely to obtain a scholarship than parents seeking religious schooling. To support the Ninth Circuit's holding, it would be necessary to show that secular parents were in fact being rejected for scholarships in greater proportion than their religious peers—or, at the very least, to show that the share of scholarships reserved for religious schooling was *greater than the share of private school demand already given over to religious schools due to parental preferences.* Because if the share of scholarships reserved for religious schools is less than or equal to the share of private school students already enrolled in religious schools, then there is no evidence that parents seeking secular schools would be at a disadvantage in obtaining a scholarship.

So what are the facts? Respondents allege that, in 1998, 94 percent of donated scholarship funds went to STOs that reserved them for use at religious schools. Compl. 3, n. 15. That was the first year in which Section 1089 was in operation, however, and little funding was actually distributed, as Respondents acknowledge. According to Respondents' own complaint, the share of scholarships *actually distributed* in 1998 that were reserved for use at religious schools was 75 percent, not 94. *Id.* at 4.

Was this larger than the actual religious share of private school enrollment? No. Based on U.S.

Department of Education data, we estimate that the share of Arizona private school students attending religious schools in 1998-99 was 75.5 percent.[8] The share of scholarship funds reserved for religious schooling was an almost precise match for the share of private school students statewide whose parents preferred that they be enrolled in religious schools. (In fact, it was slightly lower.) There is no evidence that the small fraction of private school parents seeking secular schooling would have had any less access to scholarships in 1998 than the much larger share seeking religious schooling.

And one cannot reasonably argue that Section 1089 itself substantially inflated the religious share of private sector enrollment in the 1998-99 school year. Respondents admit that, no more than $276,445 was awarded in scholarships in 1998—too small a sum to have substantially affected the distribution of private school enrollment state-wide.[9] Further, the average religious share of enrollment for the three preceding years for which data are available (1993-94, 1995-96, 1997-98) is 75.7 percent—again *above* the share of scholarships reserved for religious schools in 1998-99.

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[8] The Department of Education periodically conducts a "Private School Universe Survey," though it did not do so in the relevant 1998-99 school year. If we estimate the Arizona religious enrollment share for 1998-99 by averaging together the percentages from the 1997-98 and 1999-2000 surveys, however, we arrive at 75.5 percent. Andrew Coulson, *The Case of the Missing Evidence*, (Jan. 26, 2010), http://www.cato-at-liberty.org/2010/01/26/the-case-of-the-missing-evidence.

[9] Calculated from notes 15 through 19 of the Respondents' complaint. *See* Compl. 3-4, nn. 15-19.

See Coulson, *The Case of the Missing Evidence*, *supra*.

Most damning for Respondents' empirical claim is the fact that the share of total scholarship donations reserved for use in religious schools has fallen significantly since 1998. As already noted, Respondents allege that it was 94 percent in 1998 (the bulk of which was not distributed in that year). Based on our calculations from the official tabulations published by the ADOR, that share had fallen to 76 percent by 2004, and to 65 percent in 2008. The latter figure is more than 15 percentage points below the share of Arizona private school students enrolled in religious schools in the most recent year for which data are available (81 percent in 2007-08). *Id.* In other words, the share of scholarship funding *available* for use at secular schools is currently almost twice as large as the share of families *choosing* secular schools. There is thus no evidence that families seeking secular schooling would have any more difficulty obtaining scholarships under Section 1089 than those who prefer religious schooling.

The evidence just presented serves to underline the wisdom of Supreme Court precedents such as *Zelman*: it would indeed be "absurd" to rule on the constitutionality of a religiously neutral program based on statistical targets that vary from place to place and over time, solely as a result of changes in private choices.

V. Far from Being an Impediment to Parental Freedom, the Autonomy Granted to Taxpayers and STOs Under Section 1089 Is Ultimately Essential to It

Respondents are implicitly concerned with maximizing the freedom of parents to choose schools that comport with their values, and believe—contrary, as we have shown, to both evidence and precedent—that Section 1089 is unconstitutionally injurious to that end. Similarly, the Ninth Circuit misconstrued Section 1089 as harmful to "the secular purpose of the program, which is to provide equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." *Winn*, 562 F.3d at 1022 (panel).

Going beyond the errors in Respondents' and the Ninth Circuit's reasoning, described above, Section 1089 and similar programs are not simply *compatible* with the unfettered exercise of parental choice, they are ultimately *essential* to it. If Respondents' suit is successful, it will impede rather than advance Respondents' own implicit goal.

After 16 years of studying school systems in an international and historical context, *amicus* Coulson concludes that taxpayers' freedom to choose STOs, and of STOs to focus their scholarships on certain schools, is necessary to preserve parental choice in the long term. The reason is straightforward: The curriculum offered in elementary and secondary education systems paid for by third parties has invariably been constrained by the preferences of those who fund them. Therefore, to ensure that families with limited means

have access to a wide range of educational choices, it is necessary to provide a *proliferation of different sources* of tuition aid. This is true under both autocratic and democratic governments, and it is true whether the third party funder is a private or a government organization. *See* Coulson, *Market Education: The Unknown History* (Transaction Books, 1999).

Consider, first, the case of private funding. When left to their own devices, people do not generally subsidize activities they find morally objectionable or that violate their own convictions. When they make voluntary contributions to philanthropic causes, they tend to choose ones that specifically comport with their values. The scope of services provided by any one charitable organization thus reflects the values of its donors; it usually offers a limited subset of the services that it could conceivably provide. The Nature Conservancy does not subsidize paving contractors, and evangelical Protestant charities do not evangelize in favor of Catholicism.

The crucial point is that *so long as there is a multiplicity of charitable organizations, a wide range of services will be available to the ultimate beneficiaries.* By allowing anyone to start an STO, Section 1089 has led to the rise of a wide range of STOs, from among which parents seeking scholarships may select the one most consistent with their own values. This diversity among STOs is directly analogous to the diversity of religious and secular charitable organizations that benefit from tax deductible donations claimed against federal income taxes.

Now compare this to the case of a third-party payment system operated by a democratic government, which encompasses both Arizona's district and charter public school systems. From the start, parents in both of those systems lose all religious education options due to the Establishment Clause. And yet, as we have seen, there is strong demand in Arizona for religious educational options, so these publicly funded systems present a drastic constraint on parents' educational freedom of choice. And contrary to Section 1089, parents cannot shop around for an alternative funder in the charter or traditional public school sectors. Government-funded education systems are, by definition, single-payer.

But the advantages of Section 1089 extend beyond merely expanding parents' educational options. In his *Zelman* dissent, Justice Breyer posited that compelling taxpayers to fund religious schooling "risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric." 536 U.S. at 728-29 (Breyer, J., dissenting). Even if the Court were now to agree with that argument—the *Zelman* Court found it irrelevant to Establishment Clause analysis, *id.* at 662, n.7—it does not apply here. Under Section 1089, nobody is ever compelled to support religious schooling: Taxpayers may choose to donate to secular STOs—or forego donating to any STO.

Indeed, Section 1089's reliance on voluntary donations makes it not simply *equivalent* to public schooling for purposes of minimizing social conflict caused by taxpayer compulsion but *superior* to it. While taxpayers are not compelled to fund religious education under the public school system, they are

compelled to fund instruction in a host of ideologically and morally charged areas that have precipitated social conflicts—from the teaching of history and evolutionary biology to sex education and even different reading methodologies. *See* Coulson, *Market Education, supra*; Stephen Arons, *Compelling Belief, The Culture of American Schooling* (Univ. of Mass. Press 1983).

Eliminating this compulsion-based source of conflict confers an additional benefit on Section 1089: It relieves pressure to restrict parents' choices through the regulation of their educational options. Since no taxpayer is compelled to support a form of education he finds objectionable, he has much less incentive to lobby for regulations curtailing such education. While individual STOs may only support schools of a particular religion or outlook, parents are free to seek scholarships from any STO they choose. The possibility of a tyranny of the majority with regard to pedagogical options is thus considerably reduced under Section 1089 as compared to a single payer system such as public schooling.

Making tuition assistance available from a multiplicity of sources thus offers unique advantages in advancing the goal of providing families with access to a wide variety of choices over the long term, while simultaneously avoiding the compulsion of taxpayers that concerned Justice Breyer in his *Zelman* dissent. Section 1089 is the solution, not the problem.

CONCLUSION

It is difficult to find a better or more succinct conclusion to our arguments than the one offered by Judge O'Scannlain in his dissent from the Ninth Circuit's refusal to rehear this case *en banc*. And so we echo it here: "Because the three-judge panel's decision strays from established Supreme Court precedent, and because it jeopardizes the educational opportunities of thousands of children who enjoy the benefits of Section 1089 and related programs across the nation . . . ," *Winn*, 586 F.3d at 671 (en banc) (O'Scannlain, J., dissenting), we respectfully request that this Court reverse the Ninth Circuit.

Respectfully submitted,

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August 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 5 - 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-988, 09-991

In the

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.,

Petitioners,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Does a tax credit for charitable donations violate the Establishment Clause if taxpayers choose to direct their contributions to charities that offer scholarships to schools run by religious organizations?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding and restoring the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the Founders intended to protect religious liberties of all citizens and to encourage participation in religious activities as a civic virtue. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The Center believes the issue before this Court is one of significance to the individual liberties and rights protected by the Constitution. The Religion Clauses of the First Amendment were meant to restrain federal interference with religious practice—but not forbid public expression of faith. The First Amendment was meant to protect religious expression, not to outlaw it. The decision below, however,

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters of consent from attorneys for Petitioners have been filed with the Clerk of the Court and attorneys for Respondents have filed blanket consents.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

rules that a state may have violated the Religion Clauses by allowing taxpayers to earn a credit by making charitable donations to private school scholarship funds. The Plaintiffs complain that too many taxpayers choose to contribute their money to scholarships for church-run schools. Such a complaint was never meant to be encompassed within the freedoms enshrined in the Religion Clauses.

SUMMARY OF ARGUMENT

The Arizona law at issue in this case does not implicate the prohibition contained in the Establishment Clause. That portion of the First Amendment was originally intended as a structural federalism measure to mark the boundaries between federal and state power. Even reading the Establishment Clause to create an individual right not already encompassed in the Free Exercise Clause, that right extends no further than freedom from government coercion by force of law on matters of religious orthodoxy. Nothing in the history of the First Amendment or the Founding supports the notion that government was to avoid any connection with religion or that government was forbidden to prefer or encourage religion. In any event, the Arizona law at issue neither prefers nor encourages religion. Any religious preference in this scheme is the result of free choices made by individual taxpayers who donate to scholarship funds and the children and their families who apply to the funds for scholarships to attend the private school of their choice.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE WAS DESIGNED TO PROTECT FREE EXERCISE OF RELIGION BY PROHIBITING CONGRESS FROM COERCING RELIGIOUS ORTHODOXY BY FORCE OF LAW

The Court in *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 8 (1947), imagined that the terms of the Establishment Clause "reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity." This view, however, is not supported by the historical record surrounding the adoption of the First Amendment.

A fair reading of the congressional proceedings concerning the Bill of Rights supports the conclusion that some of Madison's amendments, including those on religion, reflected Madison's understanding of what Professor Natelson terms "the Gentlemen's Agreement." Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm. & Mary Bill of Rts. J. 73, 86 (2005); *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 252 (Helen E. Veit et al. eds., 1991) (Letter from Tench Coxe to James Madison (June 18, 1789)). This is the understanding that amendments would be proposed to the new federal constitution as a means of securing ratification. This so-called Gentlemen's Agreement is evidenced in newspaper articles, pamphlets, personal letters, and complete or partial transcripts of most of the state ratifying conventions documenting the roles of hundreds of actors

expressing the concern that, among other things, the federal government would establish a religion contrary to those established by states. It became apparent that in order to secure ratification of the new Constitution over fears expressed by the antifederalists and others, amendments would be required to make explicit that the new federal government could not exercise its powers in certain areas.

Religious freedoms were among the issues of concern raised in state ratifying conventions. The antifederalists argued that the proposed Constitution would give the federal government enough power to interfere not only with the free exercise of religion, but also the power to abolish existing state establishments in favor of a new federal establishment. Jonathan Elliot, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 191 (2d ed. 1836); *Freeman's Journal, Jan. 23, 1788, reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1557-58 (Merrill Jensen et al. eds., 1976).

The Establishment Clause was enacted as a measure of structural federalism to forbid the new federal government from encroaching on an area already addressed in state constitutions.[2] While state constitutions generally had provisions relating to religion, those provisions differed markedly from state

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[2] Indeed, for this reason, we have previously argued that the Establishment Clause was not a good candidate for incorporation via the 14th Amendment. *See* Brief of Amicus Curiae Center for Constitutional Jurisprudence, *Zelman*, 536 U.S. 639. Justice Thomas comprehensively addressed the point in his concurring opinion in the case, and we continue to believe that his analysis is correct.

to state. The Massachusetts Constitution urged the state's citizens "to worship the Supreme Being" while at the same time prohibiting government interference with religious societies or the "subordination of any one sect or denomination to another." *The Constitutions of the Several Independent States of America* 38 (Rev. William Jackson ed., 2d ed. 1783) (Mass. Const. Part I, § 2, 3 (1780)). By contrast, the Maryland Constitution required office holders to subscribe "a declaration of [their] belief in the Christian religion." *Id.* at 246 (Md. Const. of 1776, § 35). Officeholders in Pennsylvania and Delaware were also required to confess a particular religious belief as part of their oath of office. *Id.* at 191 (Penn. Const. of 1776, Ch. 2, § 10), 229 (Del. Const. of 1776, § 22), 233 (Del. Const. of 1776, § 29).

By contrast, the New York state constitution guaranteed free exercise of religion "to guard against spiritual oppression and intolerance" from "wicked Priests and Princes." *Id.* at 162 (New York Const. of 1777, § 38). The New Jersey Constitution included an explicit protection against the use of tax funds for "building or repairing any church . . . or places of worship." *Id.* at 175 (New Jersey Const. of 1776, § 18).

It was these provisions that the anti-federalist feared that the new federal government would be able to override with a competing national religious orthodoxy. In response to this fear, Madison proposed, among other provisions, his "no establishment" clause. Natelson, *supra*, at 138. Madison stated in his proposal that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any

manner contrary to their conscience." 1 *Annals of Congress* 451 (Joseph Gales ed., 1834). This was not the construction of a wall between religion and government, as Jefferson might have had it. Instead, it was a provision designed to limit the scope of power of the newly formed federal government. Certainly the measure prohibited Congress from designating a national church to which all must belong, but the language ultimately adopted, and the scraps we have of the debate leading to it, strongly suggest that the Clause was also intended to prohibit federal interference with existing state-religion relationships. The Framers of the Clause certainly did not see the provision as prohibiting acknowledgement or support of religion. *See Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J. dissenting).

The founding generation viewed religion as necessary to civil society and a properly functioning government. Based on this belief, the Framers thought that civil authorities would be wise to encourage religious exercises as long as specific sects were not singled out for preference or punishment. Zabdiel Adams, the cousin of both John and Samuel Adams, declared that "religion and morality among the people, are an object of the magistrate's attention. As to religion, they have no farther call to interpose than is necessary to give a general encouragement." Zabdiel Adams, *An Election Sermon*, Boston, 1782, *in* 1 Charles S. Hyneman & Donald S. Lutz, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, 556 (1983). George Washington's Farewell Address cautioned the country from erroneously thinking the government could function without religion among the people, and urged politicians and citizens alike "to respect and to cherish" religion.

George Washington, Farewell Address, Sept. 19, 1796, 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 229 (John C. Fitzpatrick ed., 1931). And Daniel Shute, an advocate of the new federal constitution at Massachusetts' ratifying convention, presented that era's views on religion's link to the public good when he stated:

> The great advantages accruing from the public social worship of the Deity may be a laudable motive to civil rulers to exert themselves to promote it . . . there is indeed such a connection between them [church and state], and their interest is so dependent upon each other, that the welfare of the community arises from things going *well* in both; and therefore both, though with such restrictions as their respective nature requires, claim the attention and care of the civil rulers of a people, whose duty it is to protect, and foster their subjects in the enjoyment of their religious rights and privileges, as well as civil, and upon the same principle of promoting their happiness.

Daniel Shute, *An Election Sermon*, Boston, 1768, *in* Hyneman & Lutz, *supra*, at 120.

The Founders' actions matched their words. Benjamin Franklin recalled that the First Continental Congress held daily supplications to the Deity. 1 *The Records of the Federal Convention of 1787*, at 451-52 (Max Farrand ed., 1911). He would later scold the constitutional convention for forgetting that "powerful Friend" who had helped them gain independence, and then moved that daily prayer be again instituted, though the motion eventually failed due

to lack of funds to hire chaplains. *Id.* During the War of Independence General Washington sought funds to hire military chaplains of every denomination for his troops, and was upset when the Continental Congress planned to appoint chaplains at the brigade rather than the smaller regimental level because it "in many instances would compel men to a mode of Worship which they do not profess." *Letter from George Washington to the President of Congress*, June 8, 1777, *in* 8 Fitzpatrick, *supra*, at 203.

This history does not support an interpretation of the Establishment Clause that forbids government acknowledgement of, or even support for religion in general. Instead, the Establishment Clause is best seen as forbidding the use of law to coerce religious belief or activity. *See, e.g.*, *Van Orden*, 545 U.S. at 692-94 (Thomas, J. concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 727-31 (2005) (Thomas, J. concurring); *Newdow*, 542 U.S. at 49-54 (Thomas, J. concurring). As Justice Scalia has noted: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J. dissenting). Justice Thomas has made this same point. *Newdow*, 542 U.S. at 52 (Thomas, J. concurring). Without this element of legal coercion, however, there is no true "establishment." *Id.*; *Lee*, 505 U.S. at 640 (Scalia, J. dissenting).

Not only is there no element of legal coercion in the Arizona law under review in this action, there is not even a government thumb on the scale, either endorsing or preferring religion. Taxpayers choose how to direct their charitable contributions and stu-

dents decide which schools they wish to attend. Objecting state taxpayers are not under any legal compulsion to support any private school—sectarian or secular—any more than federal taxpayers suffer some legal compulsion by the fact that their fellow taxpayers gain a tax deduction for making contributions to religious societies.

The decision of the court below ignores this history. Instead of simply prohibiting coercion, the court below sees the Establishment Clause as a mandated government preference for no religion. Under this reading of the Constitution, a potential Establishment Clause violation lurks in any government program where religion may receive a benefit or where a taxpayer may choose to fund a scholarship that a student may choose to use to attend a sectarian school. Thus, any government program—no matter how neutral—becomes suspect if a religious believer can find common purpose with the program. There is no support in the history or text of the First Amendment for such an interpretation.

Even if the Arizona tax credit is seen as using public funds to support religion (rather than to support scholarships to pay for education that may or may not have a religious element), the Establishment Clause is no bar to the program.

II. THE ESTABLISHMENT CLAUSE WAS NOT INTENDED TO PROHIBIT AID TO PRIVATE SCHOOLS

The founding generation did not see any conflict between federal funding of sectarian efforts and the Establishment Clause. As then-Justice Rehnquist once noted, President Jefferson signed a treaty with

the Kaskaskia Indians that included annual cash payments from the federal government for "support for the Tribe's Roman Catholic priest and church." *Wallace*, 472 U.S. at 103 (Rehnquist, J. dissenting). Similarly, early state governments saw no problem with financing religiously-based public education. However, increased immigration of Catholics in the mid to late Nineteenth Century led to attempts to forbid public support of sectarian education.

Maine Representative James Blaine, with an eye on the presidency, introduced an amendment to the Constitution on December 14, 1875 that would have prohibited federal or state aid in support of parochial schools. H.R.J. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875) (Statement of Rep. Blaine). Although the measure succeeded in the House of Representatives, the proposed amendment failed in the senate. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 673 (1998).

During that era, public education was provided in public schools known as common schools. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 558 (2003). The common schools were used as a base to integrate immigrant children into American society by inculcating moral education founded on Protestant religiosity. Viteritti, *supra*, at 668. For example, readings from the Protestant King James Bible were a common part of the curriculum. DeForrest, *supra*, at 559; Viteritti, *supra*, at 668. Even Horace Mann, a proponent of the move from denomi-

national schools to a system of common schools, suggested that devotional exercises should be part of the curriculum. *Id.* In fact, "[s]chools were the primary promulgators of [the] Protestant way of life." Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 45 (1992). In one case, the supreme court of Maine upheld the custom of reading from the King James Bible in common schools, stating that it could not be regarded as sectarian. Green, *supra*, at 44.

An influx of Irish immigrants created a demand for Catholic education. Consequently, Catholics and other minority religionists challenged the Protestant influence in the common schools. Green, *supra*, at 44. By the 1870s, the political influence of the Catholic population was sufficiently strong that Catholics were able to obtain public aid for Catholic parochial schools. *Id.*

This rise of the Catholic influence generated an anti-Catholic uproar by Protestants who favored continuation of the Protestant character of the common schools and opposed government aid for parochial (Catholic) education. *Id.* at 46. Attacks on the Catholic religion became common, as were disparaging remarks against the Irish ethnicity of many of the new immigrants. Viteritti, *supra*, at 667. As the plurality opinion in *Mitchell v. Helms* recently noted, "it was an open secret that 'sectarian' was code for 'Catholic.'" 530 U.S. 793, 828 (2000).

Although he failed to amend the federal Constitution, Blaine was successful in having several states amend their charters to include a ban on funding of sectarian education. At present, 37 states have provisions in their constitutions barring funding to sec-

tarian organizations. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religions Persecution*, 72 Fordham L. Rev. 493 (2003).

The history of Blaine's attempt to amend the federal constitution shows that Blaine and his contemporaries did not believe that the Establishment Clause prohibited state payments to sectarian schools. This corresponded with the Founding generation's apparent assumption that the Establishment Clause did not bar *federal* payments to religious education. *See Wallace*, 472 U.S. at 103-04 (Rehnquist, J. Dissenting).

The Court need not authorize wholesale public support of parochial schools in order to uphold the Arizona law, however. Arizona's tax credit scheme allows private donors to make the decision about how to direct charitable contributions, a private choice quite similar to that upheld by this Court in *Zelman*, 536 U.S. at 653. *See also, Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). The student's family decides which scholarships to seek and which schools to attend. While the state extends a tax benefit to the donor, it does not direct the contribution or how the scholarship is ultimately used.

This is quite similar to federal tax law, which gives taxpayers a deduction for making contributions to charitable organizations, including sectarian organizations. As with the Arizona law, it is the taxpayer that makes the choice. The taxpayer receives a benefit, and the public fisc loses money as a result of that choice. However, there is no coercion of religious orthodoxy and thus no establishment.

CONCLUSION

This case exemplifies the mischief caused by the Court's current Establishment Clause jurisprudence. The Ninth Circuit has ruled that a state taxpayer has standing to contest the tax deductions other taxpayers receive for their charitable donations. Because the law allows a taxpayer to make a donation that will provide a scholarship to a child to attend a religiously oriented private school, it converts the law into something sinister. The court below ruled that such a result empowers the federal courts to inquire into the motives of Arizona State Legislators to determine whether the stated reasons of the legislative branch of a sovereign state government was "mere pretense."

The rationale at the heart of the opinion below would also sanction the depositions of United States Representatives and Senators over their "hidden reasons" for including churches in the universe of charities that qualify for tax benefits. It is only a matter of time before someone will want to challenge the notion that their neighbor is able to get a tax deduction for tithing to their church. This case offers the Court an opportunity to rein in this erroneous interpretation of the Establishment Clause and to return it to its historical purpose of prohibiting the use of legal coercion to enforce a particular religious

orthodoxy. The judgment of the court below should be reversed and the matter dismissed.

DATED: August, 2010.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 0 6 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

In the Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL AND ADVOCATES FOR FAITH AND FREEDOM IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Christian Educators Association International ("CEAI"), founded in 1953, is a professional association for Christian educators in public and private schools. Membership consists of teachers, administrators, and para-professionals, including any person hired by a school district. Additionally, CEAI offers associate membership to parents, pastors, school board members, youth leaders, and others concerned or interested in the education of children. CEAI exists as a resource for encouraging and equipping its members in schools around the country and world. Accordingly, the resolution of this case in favor of Arizona's tax credit school choice program is therefore of great importance to CEAI and its members due to the impact it will have on school choice programs that are developed now and that are to be developed in the future throughout the Nation.

Advocates for Faith and Freedom ("Advocates"), is a California-based non-profit law firm dedicated to protecting traditional family values and religious liberties, including the right of parents to educate their children in accordance with their beliefs. Advocates seeks to ensure that

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, *amici curiae* verify that this brief was not authored, either in whole or part, by counsel for either party, nor did any party make a monetary contribution to either the preparation or submission of this brief. *Amici curiae* are non-profit corporations; they issue no stock and have no parent companies.

traditional family values so integral to the fabric of our Nation and society are not unduly altered in contravention of Constitutional principles. Consequently, Advocates has been involved in many cases involving traditional family values and religious liberty around the Nation. The right ultimately implicated in this particular case, the right for parents to educate their children in accordance with their beliefs, is one of the most dearly held rights Americans possess, as well as one of the most fundamental. The resolution of this case in favor of Arizona's tax credit school choice program is therefore of great importance to Advocates due to the impact it will have upon future cases involving school choice that will undoubtedly arise across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents argue that the State of Arizona's school choice tax credit program violates the Establishment Clause of the United States Constitution and that they, on the sole basis of their status as taxpayers, have allegedly suffered injury. The only injury that Respondents allege, however, is a reduction in the state's revenue. This purported injury is both generalized and speculative and therefore cannot confer taxpayer standing under Article III of the United States Constitution. U.S. CONST. art. III, § 2 (requiring "cases" or "controversies" to invoke federal jurisdiction). It is further not likely to be redressed by Respondents' requested remedies.

The Court has unequivocally stated that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)) (internal quotation marks omitted). An "essential and unchanging part" of enforcing the Article III "case or controversy" requirement is that the parties to the dispute have standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), especially in cases—as here--in which taxpayers challenge a law that is facially neutral and in which "their own injury is not distinct from that suffered in general by other taxpayers," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (opinion of Kennedy, J.). Therefore, no matter how disagreeable a particular act may be to members of the Court, the Court "must refrain from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of [its] judicial function, when the question is raised by a party whose interests entitle them to raise it." *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) (internal citations and quotation marks omitted).

Accordingly, this Court has recognized that it has a constitutional obligation to affirm whether litigants have standing. *See, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006). To neglect this duty, to "seek out and strike down any governmental act that [the Court] deem[s] to be repugnant to the Constitution," the Court would

itself commit an independent act in repugnance to the Constitution by acting outside of the scope of its constitutionally granted authority. *Hein*, 551 U.S. at 598; *see also Simon.*, 426 U.S. at 39 ("A federal court cannot ignore [the standing requirement] without overstepping its assigned role in our system of adjudicating only actual cases and controversies.").

The Court additionally has a prudential interest in questioning litigants' standing, especially when, as here, the Respondents' supposed standing is based on injury they have allegedly suffered as taxpayers. In such cases, the Court has emphasized (1) its deference to the relevant branch of government, *see, e.g.*, *Cuno*, 547 U.S. at 345 (acknowledging that state legislatures have "broad discretion" on matters of fiscal policy), and (2) the practical limitations that preclude the Court from resolving every dispute in which taxpayers express displeasure at how their government taxes and spends money, *see, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (recognizing that without rigorous standing requirements, "courts would be called upon to decide abstract questions of wide public significance . . . even though judicial intervention may be unnecessary to protect individual rights").

Appropriately, then, this Court has long held that "the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government." *Hein*, 551 U.S. at 593. For Courts to indiscriminately permit every taxpayer asserting a grievance they have with

regard to governmental spending to bring suit in federal court would invite a host of litigation that would effectively make the Court "monitor[ ] of the wisdom and soundness of [state fiscal] action." *Allen v. Wright*, 468 U.S. 737, 760 (1984) (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (internal quotation marks omitted). The Court's affirmation of the parties' standing is therefore necessary both prudentially and constitutionally.

To this end, the Court therefore "presume[s] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Cmmo*, 547 U.S. at 342 n.3 (2006). Accordingly, the burden of proving Article III standing is on the party asserting federal jurisdiction. *Id.*

With the Court's constitutional and prudential requirements to determine that litigants have standing, with the Court's presumption against federal jurisdiction, and with the burden of establishing standing resting on Respondents, it is readily apparent that the Respondents have failed to establish standing. This is primarily because the Respondents' alleged injury, a reduction in state revenue, is too speculative to confer taxpayer standing. Additionally, even if the alleged injury were cognizable, the enjoinment of Arizona's tax credit program that Respondents seek would not redress Respondents' asserted injuries.

ARGUMENT

I. Generally, Taxpayers Do Not Have Standing to Challenge the Constitutionality of

Legislation Merely on the Basis of Their Status as Taxpayers.

For the reasons cited above, in *Flast v. Cohen*, 392 U.S. 83 (1968), the Court "carved out a narrow exception to the general constitutional prohibition against taxpayer standing." *Hein*, 551 U.S. at 602. In so doing, the Court emphasized that the purpose of confirming litigants' standing was to ensure that "the [injury] will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Flast*, 392 U.S. at 106. To ensure that the newly created exception was sufficiently limited, the Court was careful to create a rigorous two-prong analysis requiring (1) "a logical link between [status as taxpayer] and the type of legislative enactment attacked" and (2) "a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 102. Only once a litigant has established both nexuses will the litigant "have shown a taxpayer's stake in the outcome of the controversy [sufficient to make her] a proper and appropriate party to invoke a federal court's jurisdiction." *Id.*

The same analysis and rationale apply to state taxpayers who challenge state law on the basis of their status as taxpayers. In *ASARCO Inc. v. Kadish*, the Court held that "we have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state

taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." 490 U.S. at 613–14 (opinion of Kennedy, J.) (citing *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952)). Further, in *Cuno*, the Court held that the "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers." 547 U.S. at 345. That "rationale" includes both the constitutional and prudential limitations on taxpayer standing.

II. The "Irreducible Constitutional Minimum" of Taxpayer Standing Requires Cognizable Injury, Causation, and Redressability—Respondents Have Failed to Meet the "Constitutional Minimum."

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court set forth the "irreducible constitutional minimum" of standing. As developed in that case, and affirmed in numerous decisions of this Court since, the Court held,

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant . . . . Third, it must be likely, as opposed to merely

> speculative, that the injury will be redressed by a favorable decision.

Id. at 560–61 (internal citations and quotation marks omitted); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007).

Respondents' alleged injury, a broad assertion that the state will suffer from a reduction in revenue, is neither concrete nor particularized but is by its very nature incurably speculative. Additionally, even if it were a sufficient injury to establish standing, the injunctive and declarative remedies that Respondents seek are not likely to redress Respondents' asserted injuries.

A. Respondents' Alleged Injury Is Neither Concrete nor Particularized but Is Speculative and Generalized.

As a threshold matter, to establish the requisite standing to assert a claim a litigant must first "show that (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (citing *Lujan*, 504 U.S. at 560–61). This requirement is not merely some abstract inquiry, but indeed forms the very basis of that which confers power upon the Court to review the legislative act. Indeed, as the Court stated in *Frothingham v. Mellon*:

> We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. The question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act . . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Frothingham, decided with *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

In explaining its rationale for the above conclusion, the *Frothingham* Court declared that "the administration [of] any statute[ ] likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of *public* and not of individual concern." *Id.* at 486 (emphasis added). In essence, the Court held that the very contention that state revenue would be negatively affected was a matter of *public* interest and therefore inherently incapable of establishing the particularity requirement of Article III standing.

Moreover, in that same line of reasoning, the *Frothingham* Court stated unambiguously that the impact of tax revenues on taxpayers are "indefinite and constantly changing," in other words, speculative. *Id.* The Court elaborated:

> [A taxpayer's] interest in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others, is comparatively minute and indeterminable, *and the effect upon future taxation, of any payment out of the funds [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal* . . . . *Id.* at 487 (emphasis added).

Respondents have asserted that they have suffered injury due to a reduction in state revenues, but that assertion is a far cry from the concreteness that Article III requires. To the contrary, according to *Frothingham*, the alleged harm is "indefinite," "constantly changing," "remote," "fluctuating," and "uncertain"—all such descriptions are firm indications of just how inherently speculative and conjectural Respondents' alleged injury is in this case.

Additionally, Respondents themselves concede the inherently speculative nature of their alleged injury. In their Complaint they bemoan the fact that the tax credit program "places no limit on the total amount of State funds that may be diverted to STOs each year [so that] [i]f one million

Arizona taxpayers utilized the STO credit each year, the amount of State income tax revenues annually diverted to STOs would be $500 million." (App. to Pet. Cert 119a.)

Further, Respondents' bare assertion of "reduced revenue" does not in and of itself show that anyone has actually sustained any injury. Such an allegation would require that the Respondents substantiate the supposed loss, at least with some degree of concreteness and persuasiveness. They have not done this. To the contrary, independent studies of the tax credit program are inconclusive as to the program's impact on state revenues. (Pet. Cert 14.) In fact, these "dueling reports" assert diametrically opposed figures, one asserting that the program costs taxpayers millions and the other claiming that it saves taxpayers anywhere from $99.8 to $241.5 million. (*Id.*) In *Simon v. E. Ky. Welfare Rights Org.*, the Court encountered "conflicting evidence" on a degree much less than that in the instant case, yet the Court still ultimately concluded that the complainants' alleged injury was "unadorned speculation." *Simon*, 426 U.S. at 43–44 (Complainants had asserted that tax credits from the IRS were of great importance to charitable hospitals and that therefore denial of them was likely to urge hospitals to comply with obligations to provide full services to the poor, but the respondents argued that nationwide such tax credits were negligible.)

Notably, even if the Court had not already determined that tax revenues are too inherently speculative to establish the requisite injury for Article III standing, the Court should still find that Respondents have failed to show that they *personally* have suffered as a result of their status as taxpayers. In *Warth v. Seldin*, a number of individual residents of a municipality in New York filed a lawsuit challenging a zoning ordinance that they contended prevented them from living inside city limits. In holding that none of the claimants had standing, the Court declared that a "plaintiff still must allege a distinct and palpable injury to himself, even if [the alleged] injury [is] shared by a large class of other possible litigants." *Warth*, 422 U.S. at 501. The Court went on to say that "[p]etitioners must allege and show that they *personally* have been injured, not that injury has been suffered by . . . members of the class to which they belong and which they purport to represent." *Id.* at 502 (emphasis added). Respondents in this case have offered nothing to indicate that they personally have suffered any "distinct and palpable injury" but instead have relied fully on the theory that they have been injured because they are taxpayers in a state that they claim has suffered a reduction in revenue because of the tax credit program.

Similarly, in *Raines v. Byrd*, the Court declared, "We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Id.* at 818 (quoting *Allen*, 468 U.S. at 751) (internal

citations omitted). As the previous paragraphs establish, Respondents have not demonstrated a particularized injury. They have simply asserted a reduction in state revenue and have made no effort to extend the alleged reduction in revenue to any particular harm to themselves. Moreover, it is clear from the record that Respondents' Complaint did not, and indeed could not, establish that Respondents had a "personal stake" in the legal challenge.

The Court has stated unequivocally that "unadorned speculation will not suffice to invoke the federal judicial power." *Simon*, 426 U.S. at 44. "Unadorned speculation" is precisely what Respondents have offered. It is clear that Respondents have suffered no cognizable injury and that their interest in bringing the legal challenge is therefore mere "common concern for obedience to law." *L. Singer & Sons v. Union Pac. R. Co.*, 311 U.S. 295, 303 (1940). Such "common concern" falls very short of establishing the type of particularized and concrete injury required to confer Article III taxpayer standing.

B. Even if Respondents' Alleged Injury Were Cognizable, Its Speculative Nature Renders It Not Redressable.

The Court places no small weight on the redressability component of Article III standing. It is for this reason that the Court has declared:

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is *likely to be redressed* by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.

Simon, 426 U.S. at 38. Therefore, the "very essence" of the redressability element of Article III standing is that "relief that does not remedy injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). As such, this aspect of the tripartite standing requirement is no less important than the other components. In fact, in *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 472 (1983), the Court held that redressability is necessary "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Therefore, even if Respondents' alleged injury is judicially cognizable and even if it is "fairly traceable to the challenged action of the defendant," *Lujan*, 504 U.S. at 560, Respondents do not have standing unless the requested relief would actually be likely to remedy the purported injury.

Here, Respondents assert that the injury they have suffered is a reduction in the state's revenue, thereby attempting to satisfy the imminence requirement for showing the requisite injury. In doing so, however, they have effectively conceded that their injury would likely not be redressed by a favorable outcome. This is because the Court has already determined on numerous occasions that allegations of reduced revenue, which necessarily implicate how a legislature spends tax money, are not remedied even if a Court does find that the challenged act is unconstitutional.

For example, in *ASARCO Inc. v. Kadish*, the Court determined that the respondent taxpayers' mere assertion that the challenged state statute "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes" was insufficient to establish a redressable injury. The Court expounded:

> Even if the first part of that assertion were correct, . . . it is *pure speculation whether the lawsuit would result in any actual tax relief* for respondents. If they were to prevail, it is conceivable that more money might be devoted to education; but . . . the State might reduce its supplement from the general funds to provide for other programs. The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is *remote, fluctuating and uncertain*, . . .

> and consequently the claimed injury is not likely to be redressed by a favorable decision."

ASARCO Inc., 490 U.S. at 614 (opinion of Kennedy, J.) (internal citations and quotation marks omitted) (emphasis added).

The Court assigned a similar fate to the respondent teachers' association, which had asserted that the statute's diversion of funds from public schools subjected teachers to "adverse economic impacts." The Court responded by saying:

> [E]ven if . . . respondents prevailed and increased revenues from state leases were available, maybe taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged. Even if the State were to devote more money to schools, it does not follow that there would be an increase in teacher salaries or benefits. These policy decisions might be made in different ways by the governing officials . . . . Whether the association's claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume

> either to control or to predict.

Id. at 614–15 (opinion of Kennedy, J.) (emphasis added).

Simon sheds additional light on the speculative nature of Respondents' alleged injury and the potential for a favorable decision of the court to redress the injury. In *Simon*, the complainants argued that when the IRS broadened favorable tax treatment to include nonprofit hospitals that "refused fully to serve indigents," the complainants were injured because the IRS effectively removed hospitals' incentives to provide services to the poor. *Simon*, 426 U.S. at 33. The Court reasoned that the complainants' alleged injury, which relied on numerous inferences, was "speculative" and that "whether the desired exercise of the court's remedial powers . . . would [redress the alleged injuries]" was "equally speculative." *Id.* at 42–43. Citing numerous variables that made hospitals' conduct with regard to indigent patients uncertain and unpredictable, the Court subsequently held that the complainants lacked standing. *Id.*

Respondents in this case are like the complainants in *ASARCO Inc.* and *Simon*. Respondents allege that the state's granting of tax credits to parents who utilize the school tuition organizations leads to a reduction in state revenues, but they fail to demonstrate that this is in fact true. Further, Respondents contend that the state revenue would somehow buoy up to its appropriate figure (whatever that might be) if the

tax credit program were ended, but they make no showing that an end of the program would actually result in an increase in state revenues. Like the allegations made in *Simon*, Respondents' assertions rest on numerous assumptions and as such are "purely speculative." *Simon*, 426 U.S. at 42.

At best, Respondents can argue that there is some possibility that their alleged injury would be abated if the tax credit program ceased. Perhaps if the state ceased giving tax credits to donors to student tuition organizations the state's revenue would increase, or perhaps not. Perhaps the state would divert the tax credits to some other group of taxpayers, and perhaps that group of taxpayers would contribute less in taxation overall than recipients of the tax credit do now. But, as is readily apparent from the above, whether Respondents would themselves benefit from this Court's granting of declarative and injunctive relief is totally unknown. Establishing a mere possibility that the injury might be redressed is not the same thing as saying that the injury is *likely* to be redressed. In fact, it falls substantially short of it.

CONCLUSION

Because Respondents' alleged injury is inherently speculative and would not be redressed by a favorable outcome, and in consideration of the reasons set forth in ACSTO's Petition for Writ of Certiorari, it is clear that the Respondents lack standing. Consequently, notwithstanding any legitimacy of the merits of Respondents' Establishment Clause claim, a unanimous Court declared in *DaimlerChrysler Corp. v. Cuno*: "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Cuno*, 547 U.S. at 341.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 6 - 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

In the

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE NATIONAL ASSOCIATION OF EVANGELICALS, AND THE CONVOCATION OF ANGLICANS IN NORTH AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention, the nation's largest Protestant denomination with over 44,000 churches and 16 million members. The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States, serving 50 member denominations and associations and representing more than 45,000 local churches and 30 million Christians. The Convocation of Anglicans in North America ("CANA") was established in 2005 to provide a new home for faithful Anglicans displaced by the widening divisions in Anglicanism in North America. It is affiliated with the Anglican Church in North America and with the Anglican Church of Nigeria, the largest and most vibrant Province in the worldwide Anglican Communion. The ERLC, NAE, and CANA each believe that religious freedom is a gift from God, and work to address social and moral concerns at the local, state, and national levels, with particular attention to the impact on American families and their faith. *Amici* believe that parents should have the right and opportunity to provide their children with an education based on a distinctly Christian worldview.

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[1] Pursuant to this Court's Rule 37, letters of consent from all parties to the filing of this brief have been submitted to the Clerk. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Petitioners and Judge O'Scannlain in his dissent from the Ninth Circuit's denial of rehearing en banc have amply demonstrated why faithful application of the *Lemon* test and this Court's prior decisions in *Zelman* and *Mueller* compel the conclusion that Arizona's scholarship tax credit ("Section 1089") does not violate the Establishment Clause. Rather than revisit those arguments, *amici* ERLC, NAE, and CANA submit this brief for two additional purposes. First, *amici* discuss some of the more troubling aspects of the Establishment Clause analysis applied by the Ninth Circuit panel, explaining how the panel's approach undermines rather than protects First Amendment values like governmental neutrality, private choice, and free exercise. Second, *amici* explain why, contrary to the panel's conclusion, this case is even *easier* than *Zelman*. Not only is Arizona's program a strictly neutral program of private choice, but it also steers clear of other concerns that various Justices of the Court have discussed in the context of the Establishment Clause, including concerns expressed by the dissenters in *Zelman*. Section 1089 is plainly constitutional.

I. In finding that Arizona's program violates the Establishment Clause, the Ninth Circuit panel subtly but unmistakably altered important aspects of the analysis in *Zelman* and earlier cases, which if adopted by this Court would work a sharp and destructive departure from settled Establishment Clause jurisprudence. For example, this Court has long considered "governmental neutrality" with respect to religion a key element of any program passing muster under the Establishment Clause. Thus, in *Zelman*, the

Court upheld Ohio's voucher program precisely because it was "a *neutral* program of private choice." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (emphasis added). In determining that Arizona's "program is not 'neutral in all respects toward religion,'" Pet. App. 34a,[2] the panel below substituted neutrality of *outcome* for "governmental neutrality," *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The government cannot both be facially neutral and guarantee neutrality of outcome. Where private choice plays any significant role in a program, the government can only guarantee a religiously neutral outcome by influencing that private choice either for or against religion. The panel's insistence on outcome neutrality reads the Establishment Clause as requiring governmental *non-neutrality*, compelling the government to search out and eliminate downstream private choices that favor religion, lest a program be adjudicated to violate the Establishment Clause. The panel's version of "neutrality" is a far cry from—indeed, incompatible with—the *governmental* neutrality required by this Court in *Zelman* and earlier cases.

In addition to undermining governmental neutrality in the name of neutrality, the panel's analysis also reduces the real choice of many different private actors—taxpayers, STOs, and parents generally—in the name of maximizing the choices of "parents who wish to place their children in a private secular school." Pet. App. 33a. The panel erred because it focused narrowly on only the options

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[2] "Pet. App." citations refer to the appendix attached to Petitioner Garriott's Petition for Writ of Certiorari.

presented to parents by Section 1089, instead of "*all* options" presented by Arizona. *Zelman*, 536 U.S. at 655-56 (emphasis in original). Arizona parents who seek a quality nonreligious education for their children have a smorgasbord of *free* options to choose from, including public schools with open enrollment, charter schools, traditional academies, an online "virtual academy," and homeschooling. Section 1089 merely adds private schools to those options. If parents seeking a religious education for their children have more options within Arizona's tax credit scholarship program, that is not a function of any governmental bias built into Section 1089, but instead because parents seeking a nonreligious education already have many other free options. For parents who seek a religious education for their children who otherwise cannot afford it, Section 1089 together with taxpayer donations and STOs that choose to fund religious education—is the only choice they have. That the majority of Section 1089 scholarships are used at religious schools therefore says nothing about whether the choices of parents seeking a nonreligious education are unduly constrained, but speaks volumes about the fact that none of the public schools are an option for parents seeking a religious education. By myopically focusing on only Section 1089, the panel eliminated real and beneficial choice from parents, STOs, and taxpayers, to alleviate a supposed constraint on choice that is as disconnected from reality as it is speculative.

The panel's conclusion that the secular purposes behind Section 1089 might be shown to be a "sham" or "pretense" because private actors—STOs and taxpayers—have channeled their donations and scholarships to religious entities is yet another radical deviation from this Court's Establishment Clause

jurisprudence. Pet. App. 18a-20a. Where, as here, both the face of the statute and its legislative history evidence only secular purposes, permitting courts or juries to divine hidden religious legislative agendas from private conduct occurring *after* enactment makes no sense, and threatens to expand exponentially Establishment Clause challenges to a wide variety of laws. The panel's approach also chills private religious conduct and expression, for fear that some court might infer from private religious action an impermissible purpose behind a facially neutral law.

II. This should not be a hard case after *Zelman*. In most important respects, Arizona's scholarship tax credits are indistinguishable from the vouchers in *Zelman*. The government's role in the program is completely neutral with respect to religion. Any money that reaches religious schools under the program does so only as the result of "true private choice"—indeed, more private choices than were present in *Zelman*. The only meaningful way that Arizona's program differs from the Ohio program at issue in *Zelman* is that, in addition to parental choice, the Arizona program also incorporates *taxpayer* choice. Although not dispositive under the Court's analysis in cases like *Zelman* and *Mueller*—and correctly so—certain Justices of the Court have opined that protecting the freedom of conscience of taxpayers from having their tax dollars used by the government to financially support religion is a valid Establishment Clause concern. The taxpayer choice designed into Arizona's scholarship tax credit directly addresses that concern even better than did the vouchers in *Zelman*. Under Arizona's program, no taxpayer can complain that any of his taxes are being taken to support religion against his will.

The taxpayer choice integral to Arizona's program also better advances another objective that motivated the Establishment Clause. As James Madison explained in his famous Memorial and Remonstrance, direct financial support from the government may corrupt religion by making it "dependen[t] on the powers of this world"—i.e., government—rather than on the support of its adherents. The program at issue in *Zelman* protected against this concern by mediating any indirect governmental support for religion through the choices of private citizens—parents. Arizona's program goes one step further by adding to parental choice a tax benefit scheme that, in other contexts such as federal charitable deductions, has a long history of encouraging private giving while minimizing the recipients' dependence on the government. Under Arizona's tax credit program, religious (and nonreligious) private schools, STOs, and parents, depend first and foremost not on direct governmental largess but on the generosity of private citizens. The panel was correct that taxpayer choice in Arizona's program distinguishes it from the vouchers in *Zelman*. But that additional choice differentiates Arizona's program in a way that *advances* First Amendment interests, only underscoring its constitutionality.

* * *

In sum, while the panel below purportedly applied *Zelman* to this case, it found the Establishment Clause violated only by inverting core constitutional concepts such as neutrality, private choice, and secular purpose. Clearing away the confusion, Arizona's program addresses all possible concerns underlying the Establishment Clause better than the voucher program upheld in *Zelman*, and should likewise be upheld.

ARGUMENT

I. The Ninth Circuit Panel Altered Core Establishment Clause Principles In Evaluating Arizona's Program.

A. The Panel Replaced Governmental Neutrality With Neutrality Of Outcome.

In *Zelman*, this Court considered an Ohio voucher program that provided government funds to parents for use as private school tuition. Although parents were allowed to use the funds for either religious or nonreligious education, the vast majority (96%) of children in the program "enrolled in religiously affiliated schools." *Zelman*, 536 U.S. at 647. Relying on a string of earlier cases, the Court upheld the Ohio program against an Establishment Clause challenge because the program met the twin requirements of governmental neutrality and private choice. The Court reiterated that even where tax dollars ultimately reach religious organizations, the Establishment Clause is not violated by a program where (1) the government is neutral with regard to religion and (2) "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649 (citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). Petitioners—and Judge O'Scannlain in his dissent from the Ninth Circuit's denial of rehearing en banc—have carefully and correctly explained why Arizona's program is constitutional under *Zelman*'s framework.

For decades this Court has considered "governmental neutrality between religion and religion, and between religion and nonreligion" a critical factor in analyzing an Establishment Clause challenge. *Epperson*, 393 U.S. at 104. Thus, in *Zelman* the Court upheld Ohio's voucher program against an Establishment Clause challenge precisely because it was a "*neutral* program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals." *Zelman*, 536 U.S. at 655 (emphasis added). For a law to violate the requirement of neutrality, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original).

No less than the program at issue in *Zelman*, Arizona's program is structured so that the "*government itself*" is neutral with regard to religion. *Id.* at 337. As the panel below acknowledged, even the plaintiffs in this case "do not contest that Section 1089 is neutral with respect to taxpayers who direct money to STOs, or that any of the program's aid that reaches a STO does so only as a result of the genuine and independent choice of an Arizona taxpayer." Pet. App. 34a. Yet the panel nonetheless concluded that Section 1089 "is *not* a 'neutral program of private choice.'" Pet. App. 23a (emphasis added).

The panel reached that conclusion only because it *sub silentio* converted the Establishment Clause's requirement of *governmental* neutrality into a requirement of *outcome* neutrality. Section 1089 was

deemed unconstitutional because a myriad of private choices ultimately "channels a disproportionate amount of government aid to . . . religious schools." Pet. App. 22a.[3] Arizona's program purportedly violates the Establishment Clause not as a result of any *governmental* partiality, but because *private* "STOs have not provided scholarships in a way that is neutral toward religion." Pet. App. 17a n.9. According to the panel, "Section 1089 is not, from the parents' perspective, 'neutral in all respects toward religion,' . . . . *because* the individual taxpayers' choices available under the program serve to restrict parents' opportunities to select secular educational options for their school-age children." Pet. App. 32a, 34a.

Insofar as the Establishment Clause is concerned, however, the breadth of choices ultimately available to parents, or any other downstream aid recipient, is not the relevant issue. The focus of this Court's Establishment Clause decisions is neutrality of state action, not neutrality of outcome.

In *Zelman* and earlier Establishment Clause cases, one of the main points of disagreement between the Court and the dissenters was whether neutrality should be measured before or after the effects of private choice. *Zelman*, 536 U.S. at 670 (O'Connor, J., concurring) ("Justice Souter [in dissent] rejects the

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[3] Although the Ninth Circuit panel remanded the case for "further proceedings," Pet. App. 46a, the relevant facts as alleged are not in dispute. As a practical matter, therefore, the panel's decision mandates that the district court "declare the program unconstitutional as applied, rendering the remand little more than an empty formality." Pet. App. 92a n.7 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Court's notion of neutrality, proposing that the neutrality of a program should be gauged not by the opportunities it presents but rather by its effects."). The Court has consistently required *governmental neutrality*, not neutrality of results. As the Court noted in *Zelman*: "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Zelman*, 536 U.S. at 658; *see also Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."). When government aid is "neutrally available and . . . first passes through the hands . . . of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" *Mitchell v. Helms*, 530 U.S. 793, 816 (2000) (plurality opinion) (quoting *Witters*, 474 U.S. at 489). To make an Establishment Clause challenge turn on neutrality of outcome produces the "absurd result that a neutral school choice program might be permissible" in states with low religious involvement, but unconstitutional in states with a high concentration of religious participation. *Zelman*, 536 U.S. at 657.

Imposing a neutrality-of-outcome requirement on the Establishment Clause is flawed for several reasons. Most importantly, guaranteeing or policing outcome neutrality is inconsistent with the time-honored Establishment Clause principle that the "*government itself*" must be neutral with regard to religion. *Amos*, 483 U.S. at 337. The panel's version

of "neutrality" would require the government to ensure that even facially neutral laws that allow money to reach religious institutions "only as a result of the genuinely independent and private choices of individuals," *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (internal quotation marks and citation omitted), produce an outcome that is strictly neutral with regard to religion and nonreligion. But to guarantee a neutral outcome, the government would have to manipulate, coerce, and cajole private choice.

Rather than maintaining religious neutrality and honoring private choices—as precedent requires—the panel's "neutrality" requires the government to actively tip the scales in favor of nonreligion whenever the independent public fails to produce a religiously neutral outcome on its own. *See* Pet. App. 73a-74a (D.W. Nelson, Reinhardt, and Fisher, JJ., concurring in the denial of rehearing en banc) (arguing that to ensure the constitutionality of Section 1089, Arizona "*could* . . . require that STOs" not apply religious criteria in awarding scholarships). Governmental neutrality and private choice would give way to government meddling to guarantee religiously neutral outcomes. Put simply, neutrality of outcome "is unattainable in *any* program where the government is neutral with respect to religion and nonreligion." Pet. App. 102a (O'Scannlain, J., dissenting from denial of rehearing en banc).

Requiring outcome neutrality is also problematic because it punishes thriving religious institutions merely because they are successful. Where private citizens mostly choose to support or utilize religiously based services, one likely explanation is that those services are perceived to be superior to other

alternatives, perhaps even by some outside the faith. Or it may be because the majority of those citizens are religious. Or it may be some other constitutionally permissible reason. The panel's outcome-oriented approach appears to tolerate some participation by religious organizations in a facially neutral program such as Section 1089, but only so long as they are not *too* successful in securing the support of taxpayers, STOs, and parents. This approach is completely at odds with the neutrality required by the Establishment Clause. As this Court has said: "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970) (citation omitted). Punishing religious schools merely because taxpayers (or STOs, or parents) prefer them is not neutrality, it is hostility towards religion. *See Zorach v. Clauson*, 343 U.S. 306, 315 (1952) ("We cannot read into the Bill of Rights such a philosophy of hostility to religion.").

The Ninth Circuit panel's neutrality-of-outcome requirement is also troubling because it renders all charitable deductions constitutionally suspect. The panel determined that Arizona's scholarship tax credit program unconstitutionally delegates governmental authority, while other tax benefit programs—including deductions—do not. *See* Pet. App. 24a-27a. But the panel's distinction between a tax credit and a tax deduction, while perhaps interesting as a matter of tax policy, "can have no constitutional significance." Pet. App. 89a n.3 (O'Scannlain, J., dissenting from denial of rehearing en banc). A partnership by which taxpayers and the government effectively split the cost of an Establishment Clause violation—i.e., through a

deduction program—would be no more constitutionally acceptable than a violation for which the government foots the entire bill—i.e., through a tax credit. If a state were to establish a church, for example, it would be unconstitutional regardless of whether the state supported that church entirely with tax dollars, or offered only to match private contributions. Contrary to the panel's argument, tax deductions for religious donations are not constitutionally permissible merely because they involve cost splitting between taxpayers and the government. Rather, deductions for private religious donations are allowed because, like Section 1089, they are given under a tax benefit scheme that incorporates governmental neutrality and private choice. Whether the challenged program provides a tax credit or a tax deduction, the analysis is the same—governmental neutrality layered with private choice insulates the program from attack under the Establishment Clause.

By replacing governmental neutrality with outcome neutrality, the panel below fundamentally altered a foundational pillar of this Court's Establishment Clause jurisprudence. Future application of this new rule will replace governmental neutrality with hostility towards religion. A neutrality-of-outcome standard requires intrusive state enforcement, regulation, and interference with private choice—the antithesis of true governmental neutrality.

B. The Panel's Ruling, Not Arizona's Program, Sharply Limits Private Choice.

The Ninth Circuit panel also improperly determined that Section 1089 unconstitutionally restricts the private choice of "parents who wish to

place their children in a private secular school." Pet. App. 33a. The panel's erroneous conclusion resulted from an analysis that was too narrow on two fronts: (1) it focused only on the private choices available to parents, while ignoring the other private choices exercised under Arizona's program; and (2) it focused on the options available under Section 1089 alone, ignoring the many other options available to Arizona parents outside of the tax credit scholarship program. It was the panel's decision—not Section 1089—that circumscribed the educational choices available to Arizona parents.

The panel found that Section 1089 limits parental choice because the upstream choices of taxpayers and STOs make more scholarship money available for use at religious schools than at nonreligious schools. Pet. App. 31a-32a. Focusing narrowly on Section 1089, the panel miscomprehended the breadth of options available to parents desiring a nonreligious education for their children. But as the Court explained in *Zelman*, the question of whether a program like Section 1089 is "coercing parents into sending their children to religious schools . . . must be answered by evaluating *all* options." *Zelman*, 536 U.S. at 655-56 (emphasis in original). Parents who seek a nonreligious education enjoy a plethora of *free* options in Arizona, including public schools with open enrollment, traditional academies, a virtual academy, homeschooling, and the largest number per capita in the nation of charter schools—which are "in substance merely private schools with state funding." *Id.* at 701 n.9 (Souter, J., dissenting). Arizona's Legislature worked hard to greatly "expand[] the options available in public education," *Kotterman v. Killian*, 972 P.2d 606, 611 (Ariz. 1999), with remarkable success. *See*

JAY P. GREENE, CIVIC REPORT NO. 14, THE EDUCATION FREEDOM INDEX 2 (Manhattan Inst. for Policy Research 2000), *available at* http:// www.manhattan-institute.org/pdf/cr_14.pdf (ranking Arizona first in educational freedom).

Given the abundance of free nonreligious educational options, the panel's conclusion that Section 1089 significantly constrains the choices of parents seeking a nonreligious education is simply untrue. On the other hand, *none* of Arizona's free public schooling options provide a real choice to parents who desire a religious education for their children. Before Section 1089, those parents who could not afford private school tuition had no meaningful choice in Arizona. They were "coerced into accepting public education." *Kotterman*, 972 P.2d at 615. Indeed, even now, because of the many free nonreligious schools in Arizona, "parents are actually *discouraged* from sending their children to private religious schools." Pet. App. 105a n.18 (O'Scannlain, J., dissenting from denial of rehearing en banc). In light of the disparity between overall options available to parents seeking a nonreligious versus a religious education, it is not surprising that the majority of Section 1089 scholarships are used at religious schools.

Because the panel artificially narrowed its analysis of parental choices, its decision eliminated much more private choice than it created. According to the panel, Section 1089 would be constitutional only "if the program made scholarships available to parents on a religiously neutral basis and gave them a true private choice as to where to utilize the scholarships." Pet. App. 30a. In other words, only if Arizona removed from taxpayers and STOs the choice to support only

religious education would the program be upheld. Unlike some contrived limit on parental choice, however, it is clear that taxpayers and STOs appreciate and routinely exercise their choice to support religious education, as evidenced by the fact that the "vast majority of the scholarship money under the program . . . is available only for use at religious schools." Pet. App. 31a-32a.

Taxpayer and STO choice is not the only casualty of the panel's faulty analysis--parental choice would also likely suffer under a program that denied taxpayers the opportunity to designate their donations for use at religious schools. There can be little question that religion is a powerful motivation for charitable giving. *See, e.g.*, Arthur C. Brooks, *Religious Faith and Charitable Giving*, POL'Y REV., Oct.-Nov. 2003, *available at* http://www.hoover.org/publications/policy-review/article/6577 ("[R]eligion may be a key ingredient in promoting social capital, which in turn encourages giving."); INDEPENDENT SECTOR, FAITH AND PHILANTHROPY: THE CONNECTION BETWEEN CHARITABLE BEHAVIOR AND GIVING TO RELIGION 36 (2002), *available at* http://www.independentsector.org/uploads/Resources/faith_and_philanthropy.pdf ("Givers to religious congregations are more generous . . . than those not motivated to support religion."). If taxpayers are denied the opportunity to give to STOs that pursue religious aims, then it is likely that some material number of taxpayers will stop giving, thereby reducing available scholarship funds. If that happens, fewer parents who rely on Section 1089 scholarships will be able to choose to send their children to private schools.

Ultimately, the panel held Section 1089's neutral program of private choice unconstitutional because the upstream choices of private actors (taxpayers and STOs) have the potential, however speculative, to constrain the downstream choices of parents. But that potential will always exist under any government program that incorporates private choice. In *Zelman*, for example, parents' choices were constrained by which schools chose to participate in the voucher program. *See Zelman*, 536 U.S. at 703-07 (Souter, J., dissenting). "The question is not whether a parent's choice is somehow limited or constrained, the question is whether the *government* has somehow limited or constrained the choice." Pet. App. 97a (O'Scannlain, J., dissenting from denial of rehearing en banc). Where, as here, any constraints on private choice are merely the result of choices made by other private actors, the multiplicity of private choices is cause for celebration under the Establishment Clause, not condemnation.

C. The Panel Incorrectly Considered Post-Enactment Private Conduct As Relevant To Whether A Statute Has A Secular Purpose.

The panel below readily acknowledged that the legislative history of Section 1089 evidences a purpose for the law that, on its face, "is both secular and valid." Pet. App. 18a. But the panel determined this otherwise valid purpose could be shown to be a "sham" or "pretense" based on the fact that private taxpayers, *after* the law was enacted, have given to religious STOs. Pet. App. 18a-20a. The panel's focus on post-enactment private conduct as evidence of a sham purpose behind a facially valid law finds no support in

the Court's Establishment Clause jurisprudence, and for good reason.

As support for its holding, the panel cited this Court's *McCreary* decision. Pet. App. 19a. But as *McCreary* itself plainly states, it is only government action itself, not private action, that can reveal an otherwise valid purpose to be a sham. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). Nowhere in *McCreary* did the Court look to *private* action as evidence of a sham purpose. To do so would require the Court to "attribute to a neutrally behaving government *private* religious expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (plurality opinion) (emphasis in original). Such analysis "has no antecedent in [this Court's] jurisprudence." *Id.*

In addition to having no basis in either logic or precedent, the panel's suggestion that post-enactment private conduct can be probative of legislative purpose has the potential to chill private religious expression and activity. Religious groups who might otherwise express support for a law or program may wisely self-censor lest courts presume from that expression a hidden legislative agenda. Similarly, religious organizations may prophylactically temper their participation in generally available government programs to avoid a later judicial finding that a "disproportionate amount of government aid" has been "channelled" to them. Pet. App. 22a. Allowing courts to deduce a hidden religious legislative agenda from post-enactment private conduct is a dangerous precedent with troubling consequences.

II. This Case Is Easier Than *Zelman*.

A. Taxpayer Choice Addresses Any Plausible Concern About Taxpayer Freedom Of Conscience.

The Ninth Circuit panel acknowledged that Arizona's program is facially neutral with regard to religion and that any money reaching religious schools under the program does so only through the private choices of taxpayers, STOs, and parents. Yet it held the program unconstitutional, distinguishing *Zelman* because Section 1089 also permits *taxpayer* choice. The panel concluded that this added element creates "a meaningful constitutional distinction" between Ohio's program and Arizona's. Pet. App. 45a. As noted above, the panel erred in finding that the impact of taxpayer choice on downstream private choices has any constitutional significance. But even assuming, *arguendo*, that taxpayer choice does have constitutional significance, it clearly *helps*, not hurts, Arizona's program.

Justices on the Court have at times remarked on the "Constitution's special concern that freedom of conscience not be compromised" by taxpayer support for religion. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 616 (2007) (Kennedy, J., concurring). While *amici* do not subscribe to this legal theory, it was perhaps the primary concern expressed by the dissenters in *Zelman*. *See, e.g.*, *Zelman*, 536 U.S. at 689 (Souter, J., dissenting) (arguing that the Ohio program's "use of tax-raised funds forced a taxpayer to contribut[e] to the propagation of opinions which he disbelieves") (internal quotation omitted); *id.* at 728 (Breyer, J., dissenting) ("Parental choice cannot

help the taxpayer who does not want to finance the religious education of children."). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006) (acknowledging the view stated in *Flast v. Cohen*, 392 U.S. 83 (1968), that one of "'the specific evils feared by'" the drafters of the Establishment Clause was the forced "'extraction and spending' of 'tax money' in aid of religion") (citation and alteration marks omitted).

Ohio's voucher program was upheld despite the *Zelman* dissenters' objections about taxpayer freedom of conscience. But by making taxpayer choice a key part of Section 1089, Arizona has ensured that no taxpayer is coerced into supporting—even indirectly—any religious institution, thus alleviating any plausible concern over taxpayer freedom of conscience. Any money reaching religious schools under Section 1089 was never "extract[ed]" from any taxpayer by coercion or force. *Id.* at 348. Rather, any money received for religious education is a result of the voluntary decisions of taxpayers themselves. Taxpayers can choose whether to give to an STO that funds religious education, nonreligious education, or both. Or a taxpayer can choose not to give to any STO. Under Arizona's program, not a single penny of taxpayers' money is taken without their authorization to support religion.

Thus, Section 1089 does not simply meet the Establishment Clause requirements laid out in *Zelman*, it exceeds them. In addition to being a neutral program of private choice, Arizona's program, by adding the element of taxpayer choice to the other types of private choice present in *Zelman*, more than satisfies any concern for taxpayers' freedom of

conscience. While this added protection is not necessary in light of *Zelman*, Arizona can hardly be faulted for taking extra care to safeguard the liberty of conscience of its citizens. Even assuming that the Ninth Circuit panel was correct in finding that taxpayer choice is a material distinction, it tips the scales in favor of Section 1089's constitutionality, not against it.

B. Multiple Layers Of Private Choice Prevent Religious Institutions From Depending On Direct Governmental Support.

Arizona's program is also an improvement over the program upheld in *Zelman* because it better addresses one of the motivating factors behind the Establishment Clause: protecting religious institutions from the corrupting consequences of "dependence on the powers of this world." JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, ¶ 6, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 83 (P. Kurland & R. Lerner eds., 1987). As Madison opined, "Religion flourishes in greater purity, without than with the aid of Gov[ernment]." Letter from James Madison to Edward Livingston (July 10, 1822), *in* 5 THE FOUNDERS' CONSTITUTION 106.

The voucher program upheld in *Zelman* promoted religious autonomy by filtering any governmental support through the genuine and independent choices of private citizens, i.e., the parents of schoolchildren. Arizona's program goes even further in promoting the independence of religious organizations. On top of parental choice, Section 1089 layers a tax benefit scheme that further removes any state involvement in aid reaching a religious organization. Instead of

providing scholarship funds directly to parents who then give the funds to a private school, aid under Section 1089 "is mediated first through taxpayers, and then through private scholarship programs." Pet. App. 29a. As Judge O'Scannlain explained, "[m]ultiple layers of private, individual choice separate the state from any religious entanglement: the *'government itself* is at least four times removed from any aid to religious organizations." Pet. App. 94a (O'Scannlain, J., dissenting from denial of rehearing en banc).

This scheme—even more than the program in *Zelman*—shields religious institutions from "the threat of dependence on state money." *Zelman*, 536 U.S. at 690 (Souter, J., dissenting). By providing a tax credit for all STO donations, Section 1089 encourages taxpayers to independently support a privately created STO of their choice. These principles have successfully incentivized private contributions in other situations—such as providing tax deductions for charitable donations—without risking undue dependence on governmental support. As with any charitable donations, contributions reaching religious institutions under Arizona's program do so only because of the generosity of private citizens, not governmental favoritism. Under Section 1089, religious (and nonreligious) schools depend directly on the favor and voluntary support of taxpayers, STOs, and parents, *not* the government.

CONCLUSION

For the foregoing reasons, together with the reasons stated by Petitioners and Judge O'Scannlain in his dissent below, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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August 6, 2010

AMICUS CURIAE BRIEF

Nos. 09-987 and 09-991

Supreme Court, U.S.
FILED
AUG 04 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, ET AL.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF FLORIDA SCHOOL CHOICE FUND, FOUNDATION FOR EXCELLENCE IN EDUCATION, FLORIDA ASSOCIATION OF ACADEMIC NONPUBLIC SCHOOLS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, BLACK ALLIANCE FOR EDUCATIONAL OPTIONS, AND HISPANIC COUNCIL FOR REFORM AND EDUCATIONAL OPTIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it held that Respondents who have no stake in the Arizona tax credit scholarship program have standing to assert an as-applied Establishment Clause challenge as if privately donated funds were a type of "direct aid" for religious institutions or whether the crux of the challenge itself is to the private conduct of third persons in lieu of state action.

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7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE & PROCEDURE § 1611 (3d ed. 2001) 9

INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit organizations working to improve education by creating, sustaining and expanding parental choice programs including corporate tax credit scholarships that provide educational options for K-12 students in Florida and Arizona.

Foundations

The **Florida School Choice Fund** d/b/a Step Up for Students ("FSCF") is responsible for initiating the Florida Tax Credit Scholarship Program. FLA. STAT. §§ 1002.395 and 1002.421; FLA. ADMIN. CODE rr. 6A-6.03315 and 6A-6.0960. The program expands educational opportunities for economically disadvantaged children by giving them the ability to attend a K-12 school that best meets their individual learning needs. Corporations participate in the program by applying on a first-come, first-served basis for a dollar-for-dollar tax credit against their liability for corporate income, insurance premium, alcoholic beverage excise, and direct-pay sales taxes up to an annual ceiling for donations to one or more Scholarship Funding Organizations ("SFOs") approved by the Department of Education such as

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have consented to the filing of this brief of *amici curiae*. All but one of their letters of consent is on file with this Court. The Arizona Christian School Tuition Organization's letter is enclosed with this brief.

FCSF. FLA. STAT. § 1002.395(5). The SFOs redistribute the funds as K-12 education scholarships to lower-income students who qualify for free or reduced lunch. During 2009-10, the maximum scholarship was $3,950. Approximately 28,927 students benefited, roughly 37 percent of which were black and 25 percent Hispanic.[2] Scholarship recipients attended 1,033 private schools, roughly 79% of which were religious.[3]

The **Foundation for Excellence in Education** has as its goals transforming our public schools into world class learning institutions and ensuring that all students enter the world with the skills to compete and succeed in the increasingly competitive global marketplace through the application of seven principles: (1) raising academic standards, (2) requiring standardized measurement of student achievement, (3) holding schools accountable for student performance, (4) rewarding teacher excellence, (5) increasing outcome-based funding for public schools, (6) expanding school choice; and (7) applying technological innovation in the classroom. The Honorable Jeb Bush, Governor of Florida from 1999 through 2007, is chairman of the Foundation for Excellence in Education. He championed and signed into law the Florida Corporate Income Tax Scholarship Program, along with a host of other educational reforms and school

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[2] *See* Florida Department of Education., *Corporate Tax Credit Scholarship Program*, June Quarterly Report at 4 (2010) *available at* www.floridaschoolchoice.org/Information/CTC/quarterly_reports/ftc_report_june2010.pdf (last visited July 10, 2010).

[3] *Id.* at 5.

choice measures which, together, have dramatically lifted the State of Florida's national ranking in public education.[4]

Private Schools

The **Florida Association of Academic Nonpublic Schools** ("FAANS") is an association of 23 academic school associations including 13 nonpublic school accrediting associations. Its membership encompasses the majority of nonpublic schools in the State of Florida including both non-sectarian and faith-based schools excluding post-secondary and vocational schools. More than an estimated 280,000 of Florida's children attend schools that are affiliated with FAANS and located in most of the 67 counties of the State of Florida. The number of schools from each of the 23 member associations which comprise FAANS and participate in the Florida Corporate Tax Scholarship Program varies widely irrespective of religious affiliation, but

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[4] *See, e.g.*, Florida Department of Education, *National Assessment of Educational Progress: Reading Report for Florida Grade 4* (March 2010), *available at* www.fldoe.org/asp/naep/pdf/Grade4Reading.pdf (last visited July 30, 2010) [hereinafter "NAEP Report"]; John E. Chubb, *The Achievement Gap* in REFORMING EDUCATION IN FLORIDA: A STUDY PREPARED BY THE KORET TASK FORCE ON K-12 EDUCATION (Paul Peterson ed., 2006), *available at* http://media.hoover.org/sites/default/files/documents/ktf_florida_book_67.pdf (last visited July 30, 2010); MATTHEW LADNER AND VICKI MURRAY, DEMOGRAPHY IS NOT DESTINY: REFORM LESSONS FROM FLORIDA ON OVERCOMING ACHIEVEMENT GAPS (2008), *available at* http://liberty.pacificresearch.org/docLib/20080811_080708_Demography_Destiny.pdf (last visited July 30, 2010).

nearly all support it in some manner. Consequently, FAANS is supportive of school choice programs such as the Florida Corporate Tax Scholarship Program, because it enables parents to enroll children in the religious or non-religious schools of their choice.

The **Association of Christian Schools International** ("ACSI") is an international association of Christian schools including preschools, elementary and secondary schools. The Florida region serves 373 schools that provide instruction, both religious and secular, for approximately 57,000 students. The Arizona region serves 110 schools that provide the same type of instruction for roughly 15,000 students. Worldwide, ACSI serves 5,904 schools and roughly 1,450,000 students. ACSI's services include teacher and administrator conferences, school accreditation, teacher certification, and the publication of curriculum materials. ACSI is a member of FAANS. Roughly 50% of ACSI schools participate in the Florida and Arizona tax credit scholarship programs. ACSI is supportive of school choice programs like these, because they enable parents to enroll children in the schools where they are most likely to succeed.

Parents and Students

The **Black Alliance for Educational Options** ("BAEO") is a non-profit, intergenerational organization of parents, students, educators, community activists, public officials, religious leaders, and business people. BAEO is committed to improving the educational opportunities available to minority and low-income children throughout the

United States. Low-income parents – principally blacks and Hispanics – have less access than others to high-quality teachers and schools. They are also less satisfied than middle- and upper-income parents with the schools that are available to their children. This lack of access to educational opportunities contributes to the widening gap between poor black children and whites on virtually all indicators of academic achievement. BAEO's mission is to support parental choice through programs similar to Arizona's and Florida's tax credit scholarship program as a means of empowering families and increasing educational options for black and other children living in depressed neighborhoods.

The **Hispanic Council for Reform and Educational Options** ("HCREO") is a non-profit grass roots organization of Hispanic parents, students, educators, public officials, religious leaders, and business people. HCREO's mission is to improve educational outcomes for Hispanic children by empowering families through parental choice in education, because Hispanics are among the most under-educated minority groups in the United States. HCREO is the only national public policy and grass roots Hispanic organization dedicated solely to responding to this crisis by insisting upon K-12 educational reform through programs and policies such as Arizona's and Florida's tax credit scholarship programs which empower parents to put their children in the schools where they are most likely to succeed.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is well settled that taxpayers must ordinarily have special injury to assert standing to challenge a statute. Respondents are taxpayers without any stake whatsoever in the program that they would enjoin. ARIZONA REVISED STATUTE Section 43-1089 (hereinafter "Section 1089") authorizes taxpayers to receive a tax credit for donating their own funds to a non-profit "School Tuition Organization" ("STO"), which, in turn, must allocate at least 90% of its annual revenue for educational scholarships to children to allow them to attend any qualified religious or non-religious school of their parents' choice.

Respondents complain that too many religious parents and schools and not enough secular ones benefit, because of those with whom donors and STOs freely choose to associate. But Respondents lack standing to invoke the jurisdiction of this Court for the simple reason that they are not any of these persons, *i.e.*, donors, STOs, parents, or school operators, and allege no concrete or particularized injury of their own as a result of Section 1089 – not even a disproportionate tax burden. Respondents' alleged injury is also uncertain and speculative. This Court has previously recognized that tax credits have an ambiguous impact on the state treasury. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). In Arizona, the tax credit program is, at worst, revenue-neutral, and more likely results in substantial net savings.

Rather than rule as such, the Ninth Circuit improvidently relied upon a narrow exception to the taxpayer standing rule set forth in *Flast v. Cohen*, 392 U.S. 83 (1968). But *Flast* is not applicable on these facts, because Arizona makes no public appropriation under Section 1089. Donations to STOs do not pass through the treasury; they are private and entirely voluntary, so that no taxpayer is compelled to support religion. Additionally, Section 1089 lacks a direct nexus with an exercise of the legislative taxing and spending power.

The Ninth Circuit should be reversed for the additional reason that the source of the constitutional violation that Respondents allege is not so much state action by means of the grant of the tax credit under section 1089, but the claimed imbalance in the number of donors, STOs and scholarship applicants who choose to associate with religious schools. If as many or more private persons donated to STOs that provided scholarships exclusively to secular schools, as compared to religious schools, Respondents would have no objection to Section 1089. It is primarily the private conduct of third parties that is the genesis of their complaint. But state action is not involved in the decisions of donors to contribute to and form STOs, STOs to associate with religious schools, or parents to spend scholarships at religious schools. Their conduct is not traditionally the prerogative of the state, coerced or incentivized by the state, or part of a symbiotic relationship with the state where the relationship involves the supposed constitutional violation. Never before has this Court held such a

slim reed of a connection to the state an adequate nexus or indicium of joint action.

Nor has this Court treated as "direct aid" the type of benefit conferred under Section 1089 on religious schools. The closer analogies this Court has held constitutional are "indirect aid," which passes to religious schools only as a result of numerous, private choices of individual parents of school-age children. The scholarships authorized under Section 1089 ensure even greater separation between church and state than this Court approved in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), because they are composed of private funds and because of the additional layers of choice available to private parties. Section 1089 could also be analogized to a religion-neutral public charitable investment or fee-for-services transaction, inasmuch as Arizona receives low-cost, well educated students in exchange for the tax credit. Last, Section 1089 may be viewed as another type of neutral tax-favored treatment benefiting religious and non-religious persons alike. Consequently, this Court should reverse the Ninth Circuit and deny Respondents the relief they request.

ARGUMENT

1. Respondents Lack Standing to Invoke the Jurisdiction of the Federal Courts to Bring This As-Applied Challenge.

Taxpayers must ordinarily allege special injury to challenge a statute. In this case, the two primary injuries that Respondents speculate could occur (without affirmatively alleging they do occur) by virtue of the enactment of Section 1089 are to parents who may not be able to send their children to non-religious, nonpublic schools (ACSTO App. 124a ¶ 25), or to secular schools unable to enroll the students.[5] (ACSTO App. 124a ¶ 26) However, Respondents are neither of these. Respondents do not claim to be parents of students who applied to an STO, but were turned down or put on a waiting list. They did not seek to enroll children in a qualified secular school, but discover there were insufficient tax credit scholarships for it. Unlike the key cases upon which Respondents rely, they do not claim even to be parents of public school students. *Cf. Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 762 (1973) (some plaintiffs had children attending public schools).

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[5] Under Federal Rule of Civil Procedure 19, the parents and schools in question are indispensable parties; therefore, this court cannot adjudicate directly upon their rights and the case should be dismissed. *See* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE & PROCEDURE § 1611, at 164, 168 (3d ed. 2001) (*citing, inter alia, Mallow v. Hinde*, 12 Wheat. (25 U.S.) 193, 198 (1827)).

The families with a *bona fide* interest in this case are predominately low-income families.[6] An injunction would have a real and immediate impact on them – on their ability to succeed where others cannot.[7] In Florida, the results of educational reforms such as the Florida Tax Credit Scholarship Program have been remarkable, improving student scores generally and narrowing the achievement gap between whites and minorities at twice the rate nationwide.[8] Since 2003, African-Americans in grade four have closed the gap in reading with whites by 9 points and Hispanic-Americans by 8 points.[9]

But the injunction would not affect the Respondents as parents or operators of a qualified secular school somehow disadvantaged under Section 1089. No school or association of schools participating in the tax credit scholarship program is a party to this case. Nor do Respondents purport to operate an STO or to have tried to establish one serving only secular schools, but confronted some obstacle. Most basically, Respondents do not claim even to be donors or would-be donors to any STO.

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[6] Carrie Lips and Jennifer Jacoby, *The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money*, Cato Institute Policy Analysis no. 414 (Sept. 17, 2001), at 2, *available at* www.cato.org/pubs/pas/pa414.pdf [hereinafter the "Lips and Jacoby Report"]. As amended, the Arizona tax credit requires STOs to consider financial need of applicants. 2010 Ariz. Legis. Serv, ch. 293 § 2 (West).

[7] *See* Chubb, *supra* note 4, at 68.

[8] *Id.* at 72.

[9] *See* NAEP Report, *supra* note 4, at 1.

Respondents do not allege even a psychological injury incident to the operation of the Program. *Cf. Valley Forge Christian College v. Ams. United for Separation of Church and State*, 454 U.S. 464, 485-86 (1982) (rejected as a basis for standing). In sum, Respondents do not claim to be invested or affected in any unique manner whatsoever in the Arizona tax credit scholarship program. If "the gist of the question of standing" is whether the party seeking relief has alleged a sufficient "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," Respondents have utterly failed the test. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Repeatedly, this Court has emphasized that the case-or-controversy limitation as enforced by Article III standing is crucial in maintaining the balance of power. Most recently, in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339 (2006), this Court found that city and state taxpayers lacked standing to challenge property tax abatements and investment tax credits granted to an automobile manufacturer to induce it to remain in the city. Applying the three-prong standing test developed in *Allen v. Wright*, 468 U.S. 737 (1984), this Court rejected their argument for reasons equally applicable in this case: (1) the alleged injury resulting from a tax expenditures is not legally cognizable, because it is not unique to any particular taxpayer; (2) the alleged injury is not "fairly traceable" to a tax expenditure, because its economic effects are uncertain; and (3) any increase in revenue

that would result from invalidating the tax benefit is not sufficiently likely to redress the Respondents' injury, because the legislature has the discretion to spend as it likes.

a. The Injury that Respondents Allege Is to Third Parties, Not Particular to Them.

This Court in *Cuno* found that the injury the taxpayers alleged was not "'concrete and particularized,'" but instead a grievance the taxpayer "'suffers in some indefinite way in common with people generally.'" 547 U.S. at 344 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Frothingham v. Mellon*, decided with *Mass. v. Mellon*, 262 U.S. 447, 488 (1923)). This is equally true for the Respondents who manage not to identify a single particular harm to themselves in the complaint, in contrast to parents who they speculate may be unable to enroll their students in secular schools or secular schools themselves unable to receive scholarships. (ACSTO App. 124a ¶¶ 25-26) Respondents cannot rely for standing upon third party interests. *Valley Forge*, 454 U.S. at 474; *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952); *Hein v. Freedom from Religious Found.*, 551 U.S. 587, 598 (2007) (plurality). Especially in the field of education, this Court has recognized the prerogative of the states to experiment and rejected speculative harms to others as a basis for standing. *Everson v. Bd. of Educ.*, 330 U.S. 1, 506 n.2 (1947).

At bottom, Respondents are simple taxpayers with "generalized grievances about the conduct of

government," *Flast v. Cohen*, 392 U.S. 83, 106 (1968), as opposed to "those persons likely to be most directly affected by a judicial order." *Valley Forge*, 454 U.S. at 473. At most, Defendants claim that as a direct consequence of Defendants' supposed constitutional violations, "Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program..." (ACSTO App. 126a ¶ 32) But as freely conceded in the allegation itself, any such depletion of the general fund would necessarily impact people generally, not Respondents particularly. (*Id.*)

Equally clear, "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). Consequently, even if the injury to the general fund somehow counted as a special injury to the Respondents, it is different in kind from the injuries they speculate may accrue to parents or secular schools and, thus, inadequate for standing.

b. The Economic Effects of the Alleged Injury Are Uncertain or Beneficial.

The second reason this Court held that the plaintiffs lacked standing in *Cuno* was that the injury they alleged was not "fairly traceable" to a particular tax expenditure, because its economic effects were, at best, too uncertain. *Cuno*, 547 U.S.

at 344 (*citing Lujan*, 504 U.S. at 560). The injury was not "'actual or imminent," but instead 'conjectural or hypothetical.'" *Id.* Respondents claim that Section 1089 causes diminution of the state general fund. (ACSTO App. 126a ¶ 32) But in *Cuno*, this Court held, as a matter of law, "it is unclear that tax breaks of the sort at issue ... do in fact deplete the treasury...." *Id.* In Arizona, research suggests the program is revenue-neutral or beneficial to taxpayers by as much as $186.2 million.[10] Similarly, Florida taxpayers saved $1.49 in state education funding for every dollar of tax credit received in Fiscal Year 2007-08,[11] and $1.44 after a major increase in the allowed tax cap in Fiscal Year 2008-09.[12]

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[10] Lips and Jacoby Report, *supra* note 6, at 1, 18; Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, *available at* www.azpolicy.org/sites/azpolicy.org/files/downloads/ArizonaSTOTaxCreditCMNorth.pdf (last visited July 30, 2010).

[11] Office of Program Policy Analysis and Govt. Accountability, *The Corporate Income Tax Credit Scholarship Program Saves State Dollars*, at 1 (Dec. 2008), *available at* www.oppaga.state.fl.us/reports/pdf/0868rpt.pdf (last visited June 20, 2010) [hereinafter "2008 OPPAGA Report"].

[12] Office of Program Policy Analysis and Government Accountability, *Florida Tax Credit Scholarship Program Fiscal Year 2008-09 Fiscal Impact*, at 1 (March 1, 2010), *available at* www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0868_1rpt.pdf (last visited July 30, 2010); Collins Center for Public Policy, Inc., *The Florida Corporate Income Tax Credit Scholarship Program: Updated Fiscal Analysis*, at 2 (February 2007), *available at* www.collinscenter.org/resource/resmgr/Education_Docs/Tax_Credit_Scholarship_Updat.pdf (last visited July 10, 2010).

As recognized by this Court in *Mueller v. Allen*, 463 U.S. 388, 395 (1983), states have "a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian," because, among other reasons, they "relieve public schools of a correspondingly great burden" to educate students "to the benefit of all taxpayers." The savings outlined in the reports mentioned above boil down to this type. However, the indirect benefits of the tax scholarship program would prove even more substantial, preventing the Respondents from showing the alleged injury is "fairly traceable" to the tax expenditure authorized by Section 1089. Even as alleged, Respondents claim no more than parents choosing to send their children to secular schools "*may* be unable to locate an STO." (ACSTO App. 124a ¶ 26) This is an as-applied challenge, yet Respondents failed to assert any definite or actual Establishment Clause violation and, thus, lack standing for this additional reason.

c. Respondents Have Not Adequately Alleged a Nexus Between An Injunction and Redress of Their Claimed Injury.

The third requisite for standing under *Cuno* and *Allen* is also not met in this case. This test requires a nexus between the increases in revenue that Respondents hypothesize would result from enjoining the tax credit and redress of their claimed injury. "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. But the Respondents do not allege an effect on their own tax liability at

all, as a result of striking the tax credit. As distinct from the taxpayers in *Cuno*, 547 U.S. at 343, Respondents do not allege even that the scholarship tax credit imposes disproportionate tax burdens upon them. Accordingly, Respondents' allegations are less sufficient.

There is also no allegation – and could not be – that mere termination of the Arizona tax credit would lower the tax burden on Arizona's taxpayers in general. "A taxpayer plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him." *Id.* at 344-45. Rather, "the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the 'broad and legitimate' discretion of lawmakers, which 'the courts cannot presume either to control or to predict.'" *Id.* at 345 (citation omitted). Any effect that enjoining the tax credit will have depends upon "precisely the sort of conjecture" and pure speculation that this Court "may not entertain in assessing standing." *Id.* at 350; *accord Allen*, 468 U.S. at 758-59.

d. The Narrow Exception Carved Out in *Flast v. Cohen* Is Inapplicable to this Case.

For standing, the Ninth Circuit relied primarily upon a narrow exception to the taxpayer standing rule that this Court carved out in *Flast v. Cohen*, 392 U.S. 83 (1968), but it is no more relevant in this case than it was in *Allen*, 468 U.S. at 754,

Valley Forge, 454 U.S. at 472, or *Hein*, 551 U.S. at 605. In *Flast*, this Court articulated a two-part test for determining whether a federal taxpayer has standing to challenge an allegedly unconstitutional expenditure:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.... Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

392 U.S. at 102-03.

Assuming arguendo this Court intended *Flast* to apply equally to federal and state taxing and spending, *see Cuno*, 547 U.S. 347-49, the first prong of *Flast* is not met here as it was not in *Hein* and *Valley Forge*, because the "Respondents do not

challenge any specific [legislative] action or appropriation; nor do they ask the Court to invalidate any [legislative] enactment or legislatively created program as unconstitutional." *Hein*, 551 U.S. at 605; *accord Valley Forge*, 454 U.S. at 479-80. In fact, Respondents have not raised and cannot raise a challenge under Section 1089 to any disbursement of public funds at all via grant, voucher, or otherwise nor to any extraction of taxes, because this case involves a purely voluntary tax credit and private donations. *Cf. Flast*, 392 U.S. at 85 (funds for purchase of textbooks and other instructional materials); *Nyquist*, 413 U.S. at 762-64 (maintenance and repair and tuition reimbursement grants); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (federal grants for services and research in the area of premarital adolescent sexual relations and pregnancy); *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002) (public tuition aid).[13] Consequently, Respondents have not satisfied the primary reason for the exception in *Flast*, which was to avoid forcing any citizen "to contribute three pence only of his property for the support of any one establishment." 392 U.S. at 103. Section 1089 requires nobody to contribute anything to a religious entity.

Another guiding principle of *Flast* that Respondents have not met is that the nexus between

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[13]The Ninth Circuit's reliance on this Court's silence about the challengers' standing in *Mueller v. Allen*, 463 U.S. at 390; *Hunt v. McNair*, 413 U.S. 734 (1973), and *Walz v. Tax Comm'n*, 397 U.S. 664, 666 (1970), all of which challenges failed, is inapposite. The exercise of jurisdiction is not precedent for jurisdiction. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006); *accord Hibbs v. Winn*, 542 U.S. 88, 127 (2004) (Kennedy, J., dissenting).

the plaintiff's taxpayer status and the legislative enactment must be direct. *Hein*, 551 U.S. at 603-04. This Court in *Hein* made clear that only expenditures made pursuant to an express congressional mandate and a specific congressional appropriation met the nexus requirement, as contrasted with the plaintiffs' claim that "any 'expenditure of government funds in violation of the Establishment Clause' met the test." *Id.* In this case, there is no government expenditure of funds, but even if private donated dollars somehow counted as such, Section 1089 does not mandate that parents spend scholarships at any religious school – merely that STOs provide scholarships to students attending at least two qualified schools. The discretion that STOs and parents have about where to send their children is a critical intervening variable, breaking the nexus chain.

At bottom, these Respondents are much more like the plaintiffs in *Doremus* who "sought to litigate ... not a dollars-and-cents injury but [] a religious difference." 342 U.S. at 434. Theirs is not a "good-faith pocketbook action," but a call for more entrepreneurs to found private secular schools. *Id.* Their "'interest in the moneys of the treasury ... is comparatively minute and indeterminable, and the effect upon future taxation ... remote, fluctuating and uncertain'" without even an allegation of "'any payment out of the (Treasury's) funds'" *Flast*, 392 U.S. at 92 (*citing Frothingham*, 262 U.S. at 487). Nothing about Respondents' status assures this Court that they adequately represent the interests of those with real stakes in the program or have a sufficient nexus to the constitutional infringement

alleged to bring this case. Consequently, the Ninth Circuit should be reversed.

2. State Action Is Missing As Necessary to Assert Respondents' Establishment Clause Challenge.

The Establishment Clause attaches by virtue of the Due Process Clause to state action, not private conduct. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). Applying the Establishment Clause outside this context would not advance its structural purpose of ensuring separation of church and state, but impinge upon "other language of the [First] [A]mendment." *Id.* at 16. Consequently, from the beginning, this Court has emphasized that the First Amendment "requires the *state* to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.* at 18 (emphasis added). Before this Court in the instant case is a challenge primarily to the decisions that donors, non-profit companies, parents and private schools make to associate with religious persons in light of a tax credit available to anyone. Their conduct is not attributable to state officials, *see Blum*, 457 U.S. at 1003, 1005; *Polk County v. Dodson*, 454 U.S. 312, 324-25 (1981), but rather protected by the First Amendment.

The state action is the State of Arizona's grant of a tax credit to any taxpayer which desires to contribute the taxpayer's funds to an STO. ARIZ. REV. STAT. § 43-1089(A). The Respondents do not object to the tax credit *per se*, but to the supposed imbalance that follows from the taxpayers' choice of

the STOs to which to donate (ACSTO App. 118a ¶¶ 5, 7-8), the STOs' choice of the schools with which to associate (ACSTO App. 119a-121a, 125a-126a ¶¶ 11-12, 15-18, 28-31), the parents' choice of the STOs for scholarships (ACSTO App. 124a ¶¶ 25-26), the qualified schools' admission of students adhering to a particular religion (ACSTO App. 123a-124a ¶ 23), the schools' receipt of private funds from the STOs (ACSTO App. 122a-123a¶¶ 21-22), and the schools' instruction of students consistent with a religious educational philosophy. (ACSTO App. 121a-122a, 124a ¶¶ 16-18, 24) None of this conduct can be attributed to the state under the three primary tests articulated by this Court as described below: (1) the public function test, (2) the state compulsion test, or (3) the nexus/joint action test.

a. Donors, STOs, Parents and Schools Do Not Perform Functions that Are Traditionally the Exclusive Prerogative of the State.

The public function test for state action covers only private actors performing functions "traditionally the exclusive prerogative of the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (*citing Nixon v. Condon*, 286 U.S. 73 (1932) (election); *Terry v. Adams*, 345 U.S. 461 (1953) (election); *Marsh v. Ala.*, 326 U.S. 501 (1946) (company town); *Evans v. Newton*, 382 U.S. 296 (1966) (municipal park)). None of the functions at the heart of the complaint fall into this category. Donations are traditionally voluntary, rather than coerced gifts. Arizona provides tax-favored treatment for them, but Arizona taxpayers decide

whether to contribute to an STO at all and whether to seek a tax credit for the gift. Donors play a private, not public function.

STOs are also private persons and non profit corporations exempt from federal taxation under section 501(c)(3) with just three statutory limitations: (1) they must allocate at least 90% of annual revenue for scholarships; (2) provide scholarships to students attending at least two schools, and (3) provide annual reports. ARIZ. REV. STAT. § 43-1089(F), (G)(3). In comparison to utility companies or nursing homes which the state extensively regulates without converting them into state actors, *see Jackson*, 419 U.S. at 350; *Blum*, 457 U.S. at 1004, the liberty that STOs have prevents attributing state action to them under the public function test. The fact that STOs perform a public function and have a corporate charter conferred by the state does not render STOs state actors. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987). Nor is it material that the state creates a precursor in the form of a tax credit to their scholarship awards. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient" to trigger state action. *Blum*, 457 U.S. at 1004.

Parents and private schools also do not perform functions that are traditionally the state's exclusive prerogative. The fundamental duty to educate children is not the state's, but the parents'. *Wisconsin v. Yoder*. 406 U.S. 205, 213-14 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). Private schools "serve as a benchmark for public

schools" and offer "wholesome competition with our public schools"; consequently, their independence is a legitimate interest of the state. *Mueller*, 463 U.S. at 395. Respondents allege erroneously that schools receiving tax credit scholarships receive public subsidies, but even this allegation is insufficient to invoke state action. "The Government may subsidize private entities without assuming constitutional responsibility for their actions." *San Francisco*, 483 U.S. at 544. In fact, the subsidization may be radical; for example, paying up to 90% of the patients in a nursing home, without triggering state action under the public function test. *Blum*, 457 U.S. at 1011.

b. Arizona Does Not Coerce or Encourage Religious Association.

The state compulsion test of state action is also not met in this case. It applies when the government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *See San Francisco*, 483 U.S. at 546 (collecting cases). Arizona does not compel or even financially incentivize a taxpayer to seek a tax credit to donate to an STO, much less a religious STO. Respondents are no worse off whether they contribute or not to an STO. *See Hibbs v. Winn*, 542 U.S. 88, 95 (2004) (Section 1089 "gives Arizona taxpayers an election. They may direct $500 to an STO, or to the Arizona Department of Revenue."). Arizona does not even require taxpayers to choose between paying taxes and contributing to STOs; taxpayers may claim multiple

alternative tax credits or deductions relating to education; *see, e.g.*, the public school tax credit, ARIZ. REV. STAT. § 43-1089.01, charitable tax credit, ARIZ. REV. STAT. § 43-1088, and education and library property exemption. ARIZ. REV. STAT. § 42-11104.

In addition, Section 1089 does not provide a greater credit for donations to religious STOs as compared to secular ones. Anybody can create an STO; and STOs are free to decide the schools with which they will associate whether religious or secular. Section 1089 requires merely that STOs associate with at least two schools of any sort. ARIZ. REV. STAT. § 43-1089(g)(3). Parents are not required or incentivized to apply for scholarships from STOs for their children to attend secular or religious schools. As in *Zelman*, families are actually disincentivized to choose a private school over public schools where their children could receive a good education, because of the cost involved. 536 U.S. at 654.

Parents have multiple other options to educate their children in Arizona. *See Kotterman v. Killian*, 193 Ariz. 273, 972 P. 2d 606, 611 (1999), *cert. denied*, 528 U.S. 921 (1999) (listing some options). But the Ninth Circuit disregarded them against this Court's warning to avoid the "arbitrariness" of failing to "consider all reasonable educational alternatives to religious schools that are available to parents," *Zelman*, 536 U.S. at 660; *id.* at 663 (O'Connor, J., concurring), and the full panoply of tax-favored options. *Mueller*, 463 U.S. at 396. Because donors, STOs and parents are entirely free to support and associate with religious STOs or

schools or a plethora of secular alternatives, and are not hindered from founding their own, their conduct cannot be attributed to the state under the state compulsion test.

c. Arizona Has Not Entered into a Symbiotic Relationship with Donors, STOs, Parents or Schools.

The nexus/joint action test for state action is also not met in this case, because Arizona has not "so far insinuated itself into a position of interdependence" with the Petitioners so as to become "a joint participant in the enterprise." *Jackson*, 419 U.S. at 357-58 (*citing Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). To charge a private party with state action under this test, the governmental body and private party must be intertwined in a "symbiotic relationship," *Jackson*, 419 U.S. at 357; *Evans*, 382 U.S. at 299, which involves the alleged constitutional violation. *San Francisco*, 483 U.S. at 547 n.29.

Far short of this type of relationship, Arizona's exclusive involvement in the tax credit program after granting the tax credit is to receive the most basic of reports from STOs about scholarship recipients.[14] ARIZ. REV. STAT. § 43-1089(F). Donors must merely file their taxes. Never before has this Court held such a slender reed of a connection to the state an adequate nexus or

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[14]As amended, Section 1089 requires the state to begin certifying STOs, but this is still far short of the type of nexus required for state action. *See* 2010 Ariz. Legis. Serv, ch. 293 (West).

indicium of joint action. Causation is not even established in this instance, where parents are at liberty to sacrifice and send their children to religious schools whether or not on scholarship and donors may contribute to religious schools directly.

d. The Tax Credit Itself is Constitutional.

The only state action at issue in this case, the grant of a tax credit to taxpayers who choose to apply for one, is not itself unconstitutional. To the extent the tax credit involves the state at all with religion; it is exclusively on a neutral basis with non-religion. Tax-favored treatment of donations "encouraging gifts to charitable entities, including but not limited to religious organizations – is neither to advance nor inhibit religion." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 696 (1989). Consequently, a program "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller*, 463 U.S. at 398-99; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

In the interest of federalism, this Court held in *Walz*, "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion] – on a neutral basis than the Federal Government." 397 U.S. at 699. In the same spirit, this Court has accorded to "legislatures ... especially broad latitude in creating classifications and distinctions in tax statutes," *Mueller*, 463 U.S. at 396, *accord Zobrest*, 509 U.S. at

9; and, in stark contrast to the approach of the Ninth Circuit, has refused to "attribute unconstitutional motives to states" or to second-guess a legislature's secular purpose of a program. *Compare Mueller*, 463 U.S. at 394; *accord Bowen*, 487 U.S. at 604 (refusing to second-guess Congress' secular purpose even if part religious) *with Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F. 3d 1002, 1012 (9th Cir. 2009), *cert. granted*, _ U.S. _, 130 S.Ct. 3350 (May 24, 2010) (treating the legislature's purpose as a potential sham). Nowhere is this deference more critical than in the area of education to enable the types of reforms proven successful in Florida to combat a growing achievement gap nationally between whites and minorities.[15] *Zelman*, 536 U.S. at 678-79 (Thomas, J., concurring).

This would be a much different case were there an allegation that Section 1089 limits the tax credit exclusively for services that religious institutions are somehow uniquely well qualified to carry out, *accord Bowen*, 487 U.S. at 605, or if the statute advantaged donors who contribute to religious STOs or parents who choose to associate with religious schools. Instead, Petitioners' complaint boils down, at best, to a concern that not enough taxpayers are donating to secular STOs and not enough secular schools are taking advantage of the Program. If true, this is something for the invisible hand of the market to correct, but it is not a constitutionally cognizable dilemma. *See Mueller*, 463 U.S. at 401 ("[T]he fact that private persons fail

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[15] *See* Chubb, *supra* note 4, at 69.

in a particular year to claim the tax relief to which they are entitled – under a facially neutral statute – should be of little importance in determining the constitutionality of the statute permitting such relief."). Because the market is responsible for any limits on choice, not the government, the Ninth Circuit should be reversed.

3. The Ninth Circuit's Decision Rests on an Erroneous Interpretation of "Aid" and Favored Tax Treatment.

The term "aid" is bandied about in much of the analysis of the Ninth Circuit below, but without a familiar footing in this Court's jurisprudence. The Ninth Circuit uses the term "aid" like it does "benefit," *see Winn*, 562 F. 3d at 1013, and treats the aid at issue in this case like this Court does "direct aid." *See id.* at 1002 & 1021. On the other hand, the Ninth Circuit denies the validity of much closer analogies to our facts such as "indirect aid" and neutral favored tax treatment. *See id.* at 1014-18. There is also a similarity between Section 1089 and constitutional governmental services not considered by the Ninth Circuit.

a. Incidental Benefits Conferred on Religious Persons Are Not *Per Se* Unconstitutional.

One potential reading of the Ninth Circuit's decision below is that the court meant the word "benefit" as a synonym for "aid" as if any incidental benefit received by a religious institution is somehow impermissible aid. To the contrary, "[o]ne fixed

principle" is this Court's "consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause.'" *Mueller*, 463 U.S. at 392 (collecting cases); *Agostini v. Felton*, 521 U.S. 203, 226 (1997) ("[W]e have departed from the rule ... that all government aid that directly assists the educational function of religious schools is invalid.").

The primary intended and actual beneficiaries of Section 1089 are the children and families receiving scholarships to send their children to private schools. The STOs providing the scholarships and private schools receiving them are, at most, incidental beneficiaries of Section 1089. When, as in this case, parents and children primarily benefit, this Court has approved all sorts of incidental benefits for religious schools, such as reimbursement for expenses incurred in transporting children to school, *see Everson*, 330 U.S. at 3; loans of secular textbooks to schoolchildren, *see Bd. of Educ. v. Allen*, 392 U.S. 236, 241 (1968), tax deductions for expenses incurred in providing "tuition, textbooks and transportation" for children attending religious schools, *Mueller*, 463 U.S. at 391 n.1; and scholarships. *Zelman*, 536 U.S. at 645.

In these cases, it was immaterial that religious schools and parents predominately or primarily participated in the program. *See Mueller*, 463 U.S. at 391 (95% of the students attended sectarian schools); *Zelman*, 536 U.S. at 655 ("That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as

a violation of the Establishment Clause."); *Agostini*, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid.") Any benefit that religious schools receive under Section 1089 is no different in kind, type, or extent than these.

Respondents express concern that Section 1089 may "enabl[e] children to attend religious schools at State expense." (ACSTO App. 120a ¶ 12) But this Court has previously rejected similar "but for" causation arguments, acknowledging that without constitutional "aid," parents may, indeed, not have chosen to send their children to parochial schools. *Zobrest*, 509 U.S. at 11; *Allen*, 392 U.S. at 242-43; *Everson*, 330 U.S. at 17-18. Scholarships "'necessarily reliev[e] a religious school of 'an expense that it otherwise would have assumed.'" *Agostini*, 521 U.S. at 228. But cutting off church schools from these services "is obviously not the purpose of the First Amendment." *Everson*, 330 U.S. at 18. "State power is no more to be used so as to handicap religions, than it is to favor them." *Id.* Consequently, impermissible "aid" under the Establishment Clause is not, as the Ninth Circuit implies, merely an incidental benefit conferred on religious persons.

b. Section 1089 Is Not A Form of "Direct Aid."

Another erroneous use of the term "aid" in the decision below is to confuse Section 1089 with "direct aid." As used by this Court, "direct aid" to religious

institutions has ordinarily involved direct financial or other unreimbursed assistance financed by government funds. It is like a "gift" or payment "made with no expectation of a financial return commensurate with the amount of the gift." *Hernandez*, 490 U.S. at 690. Direct aid has also been termed a "direct cash subsidy," *Zobrest*, 509 U.S. at 12, where there is no *quid pro quo* exchange. *Id.* Its purpose is "*unmistakably* to provide desired financial support for nonpublic, sectarian institutions." *Nyquist*, 413 U.S. at 783.

Examples of "direct aid" include a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees, *see id.*; remedial education teachers, guidance and job counselors assisting at religious schools, *see Agostini*, 521 U.S. at 208; and a loan of textbooks for religious schools. *See Allen*, 392 U.S. at 241. These cases involving direct aid have nothing in common with the Arizona tax credit program for several reasons. First, Arizona writes no check to any institution under Section 1089; donors and STOs do. Not a single religious school or person receives any public appropriation or reimbursement. The State's credit is not even at stake. Second, the benefit accrues to religious institutions only as a result of the independent decisions of taxpayers and STOs. Third, Section 1089 does not require or encourage checks to be written to religious, as opposed to secular, STOs, parents, or schools; therefore, the statute's purpose is not "unmistakably" in support of religious institutions. Fourth, students and their parents are the primary beneficiaries of the tax credit. Consequently, direct

aid is not a suitable analogy for the benefits religious persons receive under Section 1089.

c. If Aid, Section 1089 Is Similar to Constitutional "Indirect Aid," Although Less Direct.

A use of the term "aid" in conjunction with Section 1089 explicitly rejected by the court below is "indirect aid." Yet this is a closer characterization of Section 1089 with the important caveat that the funds at issue here are not derived from the public treasury. As used by this Court, "indirect aid" programs are "neutral with respect to religion, and provide[] assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Zelman*, 536 U.S. at 652. This Court has "never found a program of true private choice to offend the Establishment Clause." *Id.* at 653. In fact, contrary to the Ninth Circuit, this Court has determined that "no reasonable observer would think a neutral program of private choice ... carries with it the imprimatur of government endorsement." *Id.* at 655.

If it is indirect aid at all, Section 1089 provides an even less direct sort than was true in *Zelman*, because of the role donors and STOs play in exercising their independent private choices. This does not, as the Ninth Circuit claimed, render the aid somehow more suspect, but even less so, because the nexus between state and religion is further removed financially and through the additional layers of choice that private parties make such as

these: (1) whether to form an STO, (2) whether to donate to an STO and, if so, which one, (3) whether an STO will associate with religious or secular schools or both, (4) whether a parent should apply to an STO for a scholarship or exercise another type of school choice, and (5) whether to send children on scholarship to a religious or secular school.

The government itself makes none of these decisions. Whatever assistance Arizona provides through Section 1089 still becomes "available only as a result of numerous, private choices of individual parents of school-age children." *Mueller*, 463 U.S. at 399; *Zelman*, 536 U.S. at 649; *Zobrest*, 509 U.S. at 9. Furthermore, as in *Zelman*, there are no obstacles to non-religious schools forming and nothing to prevent STOs from associating exclusively with secular schools. New schools and STOs come and go as a result of supply and demand, so that taking snapshots of the operation of Section 1089 is misleading. *Accord Zelman*, 536 U.S. at 658 n.4. The market where private choice is exercised is fluid, whereas the parity that Respondents demand is feasible only through the introduction of government inducements and controls that are the hallmark of direct aid, rather than the very indirect type of aid, if aid at all, evident in this case.

d. Section 1089 Is A Public Charitable Investment.

Section 1089 could also be analogized to a religion-neutral public charitable investment or fee-for-services transaction, rather than government aid. "[T]his Court has long recognized that religious

schools pursue two goals, religious instruction and secular education." *Allen*, 392 U.S. at 245. For the tax credit, Arizona receives low-cost, well-educated students. The cost of the tax credit is revenue-neutral or revenue-generating and the test gains substantial.[16] The full extent of the gains have not yet been fully studied in Arizona as in Florida, where students who participate in the Florida Tax Credit Scholarship Program previously attended some of the lowest-performing public schools and were themselves among the lowest-performing students.[17] Parents in Florida report far greater satisfaction with the schools their children attend on scholarship, where they score on par with students nationally not from their same low-income or racial backgrounds.[18] In this manner, the program helps to shrink the achievement gap in education between whites and minorities.

Another revenue-neutral program and investment in education this Court approved was tax-exempt bond financing benefiting religious and non-religious post-secondary institutions neutrally. This Court called it a "very special sort" of aid similar to a "governmental service," pursuant to which educational institutions receive private

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[16] *See* Lips and Jacoby Report, *supra* note 6, at 1, 18; 2008 OPPAGA Report, *supra* note 11, at 1.

[17] *See* David N. Figlio, *Evaluation of the Florida Tax Credit Scholarship Program: Participation, Compliance, Test Scores and Parental Satisfaction in 2008-09*, at 2 (June 2010), *available at* www.floridaschoolchoice.org/information/ctc/files/figlio_ftc_test_score_report_2010.pdf (last visited on July 31, 2010).

[18] *Id.*

financial support. *Hunt v. McNair*, 413 U.S. 734, 745 n.7 (1973).[19] In *Hunt*, this Court considered constitutional the "instrumentality (Authority) through which educational institutions may borrow" tax-exempt funds "upon more favorable interest terms than otherwise would be available." *Id.* All of the Authority's expenses incurred in issuing the bonds were paid from the revenue of the projects without any expenditure of general revenue, *id.* at 738, so bond issuances were revenue-neutral as is Section 1089, and they were also an investment in education.

The question how many religious versus secular schools utilized the Authority was not important to this Court in *Hunt*. Neither has the comparison played a role with respect to other government services considered constitutional by this Court, such as "state-paid policemen, detailed to protect children going to and from church schools," *Id.*; *accord Everson*, 330 U.S. at 17; *Zobrest*, 509 U.S. at 8; "fire protection, connections for sewage disposal, public highways and sidewalks," *Everson*, 330 U.S. at 17-18; *accord Zobrest*, 509 U.S. at 8; *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981); and school health services, *Zobrest*, 509 U.S. at 13 n.10. To suggest that the constitutionality of a scholarship

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[19] When *Hunt* was decided, this Court distinguished the eligibility of pervasively religious schools to participate neutrally in tax-exempt bond financing. But this Court has since replaced this doctrine. *See Columbia Union College v. Oliver*, 254 F. 3d 496, 502-04 (4th Cir. 2001) (*citing Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality), and *Steele v. Indus. Dev. Bd.*, 301 F. 3d 401, 407-08 (6th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); *see also Bowen*, 487 U.S. at 611.

tax credit, which is more obviously a public investment than these services, depends upon how many religious persons use it makes less sense than enjoining publicly-paid crossing guards who primarily help parochial students across the street.

e. Section 1089 Is Just Another Type of Constitutional and Favored Tax Treatment.

The last analogy explicitly rejected by the Ninth Circuit is that between a tax deduction or exemption and Section 1089. *See Winn*, 562 F. 3d at 1010, 1014-15 & n.12. All three have "an economic effect comparable to that of aid," but are not in fact aid. *Compare Mueller*, 463 U.S. at 399, *with Winn*, 562 F.3d at 1009. A tax credit is much more like a tax exemption than a grant, because "the government does not transfer part of its revenue to churches, but simply abstains from demanding" support from the taxpayer. *Walz*, 397 U.S. at 675. The credit is another type of neutral, favored tax treatment considered constitutional from the country's founding. *Id.* at 676-77. This Court has repeatedly held that when private persons donate even directly to a religious institution and receive favored tax treatment for it, there is no establishment. *Hernandez*, 490 U.S. at 696; *Mueller*, 463 U.S. at 396 (upholding Minnesota tax deduction for educational expenses); *Walz*, 397 U.S. at 675 (upholding an exemption for religious organizations from New York property tax). Arizona has not even done that much here.

True, Section 1089 is a tax credit, not a tax deduction. Laboring to distinguish the two, the Ninth Circuit spills much ink over the one-for-one character of the credit, as compared to the lesser deduction, as if the absolute dollars raised should affect the constitutional analysis. But even if it took three deductions to equal a credit, surely it would put form over substance to consider the one constitutional and the other not. The total allowed in credits in this case is not materially different from in *Mueller*, 463 U.S. at 391 (a deduction may not exceed $500 per dependent in grades K through six and $700 per dependent in grades seven through twelve."). *Cf.* ARIZ. REV. STAT. § 43-1089(A) ($500 per single individual or head of household or $1,000 for a married couple filing jointly). Furthermore, the value of the tax credit scholarships that parents redeem at religious schools, as in *Zelman*, to quote from Justice O'Connor, "pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions" through income, property, and tax deductions and, Justice O'Connor added, "tax credits for educational expenses." *Zelman*, 536 U.S. at 665 (O'Connor, J. concurring).

CONCLUSION

Respondents are without standing to bring this action, have complained essentially about private conduct not subject to the Establishment Clause, and have mischaracterized Section 1089 as impermissible aid. The judgment of the United

States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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August 4, 2010

AMICUS CURIAE BRIEF

Nos. 09-987, 09-991

Supreme Court, U.S.
FILED
AUG 0 6 2010
E CLERK

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, *et al.*,

Respondents.

GALE GARRIOTT,

Petitioner,

v.

KATHLEEN M. WINN, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE GOLDWATER INSTITUTE AND U.S. REPRESENTATIVE TRENT FRANKS AS AMICI CURIAE SUPPORTING PETITIONERS

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BRIEF FOR THE GOLDWATER INSTITUTE AND U.S. REPRESENTATIVE TRENT FRANKS AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE[1]

Amicus Goldwater Institute is a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Institute was established in 1988 to advance non-partisan public policies of limited government, economic freedom, and individual responsibility. Of particular interest to the Institute is education reform, including school choice. Many of the recent education reforms in Arizona trace their inspiration to the Institute, which also produces policy studies to support its work. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor may provide more than five percent of the Institute's annual revenue on an ongoing basis.

This case concerns the Institute because it works to advance innovative policy solutions to advance educational freedom and opportunity in Arizona. This work includes hosting conferences, testifying at the State Capitol, and working with legislative and community leaders to promote a truly competitive, market-based, high quality educational system. The

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae and its counsel, made a monetary contribution to the preparation or submission of this brief. All parties consent to the filing of this brief.

United States Court of Appeals for the Ninth Circuit's decision in this lawsuit forecloses important options that expand educational opportunities for Arizona's schoolchildren.

Amicus Trent Franks is a member of the United States House of Representatives. As a former Arizona state legislator, Representative Franks sponsored the scholarship tax credit program that is the subject of this lawsuit.

This brief was primarily written by Matthew Ladner, Ph.D., Vice President of Research at the Goldwater Institute, with the assistance of counsel of record. The brief shares Dr. Ladner's knowledge and expertise in educational policy. Prior to joining the Goldwater Institute, Dr. Ladner was Director of State Projects at the Alliance for School Choice, where he provided support and resources for state-based school choice efforts. Dr. Ladner has written numerous studies on school choice, charter schools, and special education reform. He is a graduate of the University of Texas at Austin and received both a Masters degree and a Ph.D. in Political Science from the University of Houston. Dr. Ladner previously served as director of the Center for Economic Prosperity at the Goldwater Institute and as Vice President of Policy and Communications at Children First America.

SUMMARY OF THE ARGUMENT

Much like the system of school choice upheld by this Court in *Zelman v. Simmons-Harris*, 536 U.S.

639 (2002), Arizona provides genuine opportunities for school choice consistent with the Court's uninterrupted line of precedent. Arizona's private school tax credits are a small component of a larger framework of school choice that includes a number of schooling options such as inter-district choice among public schools, intra-district choice among public schools, one of the nation's most liberal public charter school laws, a growing number of magnet school programs, and state funding for online learning. Given the open statewide public school choice and the plethora of state-funded alternatives, it is reasonable to assert that *every* K-12 student in Arizona attends a school of choice.

Arizona's tax credit program provides scholarships for children to attend both secular *and* sectarian private schools. There is no factual support for the Ninth Circuit's conclusion that Arizona pressures parents into choosing religious private schools over all other diverse and readily available options. When the system is considered as a whole, it becomes clear that Arizona not only provides numerous non-religious schooling options for parents, it also funds these options at a much higher level than the indirect assistance provided to parents through the tax credit program. Arizona law does not compel parents to choose religious private schools. If anything, Arizona's policies skew heavily in favor of secular options.

ARGUMENT

The scholarship's supporters and beneficiaries are, unfortunately, no strangers to legal challenges. This very program was challenged, inter alia, on First Amendment grounds in state court. The program was upheld by the Arizona Supreme Court in *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), *cert. denied*, 528 U.S. 810 (1999), which made the commonsense observation that the program's operation is far-removed from the concerns of state and federal establishment clauses not only because of multiple layers of private choice, but also because the funds are conveyed directly to scholarship organizations and therefore never become public funds. This Court declined to review that decision, yet the program is in jeopardy again based on the same legal arguments rejected in *Kotterman*.

In *Zelman v. Simmons-Harris*, this Court held that the Cleveland Scholarship Program, a state funded voucher law, did not violate the First Amendment's Establishment Clause. In reaching this decision, *Zelman* considered the full context of parental choice programs in Ohio. 536 U.S. at 653-60. Likewise, when the full context of Arizona's parental choice programs is considered, it becomes clear that the tax credits at issue, Ariz. Rev. Stat. Ann. (A.R.S.) § 43-1089 (2010), are merely a constitutional component of a larger system of "pure private choice." *See Zelman*, 536 U.S. at 650. The facts below reflect the reality that A.R.S. § 43-1089 in no way compels parents to send their children to religious private

schools. Parents have many more secular options than sectarian options, and secular schools receive far more direct financial support from the State than sectarian private schools receive in aid from the tax credit program at issue.

A. Arizona's K-12 Education System and Alternatives Give Parents Ample Choices Within and Between Public School Districts

Arizona has a vibrant system of K-12 parental choice. State lawmakers adopted both inter and intra district choice programs for school districts in 1994. This law provides for state funds to follow children to the public school of their choice, subject to the availability of space in each school. Although no systematic data exists compiling the number of students exercising inter- and intra-district choice, thousands of children utilize these programs.

The Gilbert Unified School District has over 3,000 out-of-district children attending, and the Mesa Unified School District has nearly 3,000 out-of-district children attending. Michelle Reese, *Education Choices Abound*, MESA TRIBUNE, March 10, 2010. In addition, Arizona school districts created numerous magnet school programs, organized around a particular academic focus and without attendance boundaries. The State also funds online education courses, providing a new horizon of educational options for parents who wish to remain within the

school district system. *See* Pat Kossan, *Arizona expands K-12 online learning*, ARIZ. REPUBLIC, September 24, 2009, *available at* http://www.azcentral.com/news/articles/2009/09/24/20090924onlineexpands0924.html (last visited August 2, 2010) (reporting that under a pilot program the state liberalized the provision of online courses for districts and charter schools statewide in 2009).

In addition to choices within and between school districts, Arizona has one of the nation's most liberal charter school laws. Charter schools are public schools governed by independent boards of directors and exempt from some aspects of state regulation. Funding for charter schools comes from the State on a per-child basis, and they have no geographically defined attendance boundaries. Arizona parents dissatisfied with their zoned district schools have numerous public charter school choices, including magnet schools, charter schools, cyber-charter schools, and other district schools.

Almost a tenth of Arizona's public school students now attend 566 charter schools, with new schools approved for operation every year. Charter school attendance has grown strongly in Arizona, experiencing a 13% increase in aggregate enrollment during the 2008-09 school year. Not only are charter school options ample, but parents take advantage of these options by sending their children to public charter schools despite the concurrent availability of private school tax credits. Consequently, the facts do not support the conclusion that Arizona forcibly channels

parents and children to private schools, much less sectarian private schools, through the challenged tax credit program.

Arizona's tax credit law provides a profoundly lower amount of private school scholarship aid per student when compared to the aid that follows students attending public schools. Namely, in 2008 the average tax scholarship per pupil was $1,909. Ariz. Dep't of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2008.pdf (last visited August 2, 2010). By comparison, in 2009, taxpayers granted a total estimated expenditure for public district school students of $9,698 per pupil. Joint Legislative Budget Comm., *K-12 Funding Since 2000 (All Funding)*, http://www.azleg.gov/jlbc/allfunding.pdf (last visited August 2, 2010). Although the State does not calculate an equivalent expenditure number for Arizona's 566 public charter schools, the total aid per pupil for Arizona public charter schools can be calculated through information provided in the Arizona Superintendent of Public Instruction's Annual Financial Report. Specifically, its 2009 Report lists total revenue for all Arizona charter schools at $792,071,084. Ariz. Dep't of Educ., *Annual Report of the Ariz. Superintendent of Public Instruction Vol. 1 Fiscal Year 2008-2009* at 6, *available at* http://www.ade.az.gov/AnnualReport/AnnualReport2009/Vol1.pdf (last visited August 2, 2010). The same report lists

the total Average Daily Membership (attendance) for Arizona charter schools as 99,018. *Id.* at 8. Dividing total revenue by total enrollment reveals that in 2009 taxpayers granted a total estimated expenditure for public charter school students of $7,999 per pupil.

In addition to the fact that aid to students attending public district and charter options is profoundly higher than the indirect subsidies provided by tax credits, the State provides aid to public schools on a guaranteed formulaic basis. As a thought experiment, imagine the situation reversed; public schools collected funds indirectly through a system of tax credits while private schools received direct per-capita subsidies from the State in much larger, guaranteed, and predictable amounts. It would be a brazen religious school supporter indeed to stand up and cry foul by claiming that the State's system of tax credits for public schools *forced* children to attend public schools. Arizona's school funding system, in other words, profoundly favors attending district and charter schools.

Finally, the totality of Arizona's fiscal policy strongly favors public district school attendance over public charter school attendance, and by an *even wider margin* provides much greater assistance for those attending public schools than private schools. Parents must pay public school taxes even if they do their fellow taxpayers the service of placing their children in a private school at their own expense. Namely, if parents decide that private school education is best for their children, the result is that

they effectively pay twice for their choice – first through taxes, and again through private school tuition and fees. Arizona's modest scholarship program only partially addresses this inequity.

In short, there is no question that Arizona's fiscal policy disadvantages parents who choose to place their children in private schools rather than public schools. For this very reason, the challenged tax credit program certainly does not evince an intention by the State to force children into private sectarian schools.

B. Choice Programs Expand Educational Opportunities for Children Who Need Them

Scholars researching parental choice programs have found a positive correlation between the competition parental choice programs foster and student learning gains. For example, Stanford economist Caroline Hoxby measured the competitive impact of the Milwaukee Parental Choice Program. Caroline M. Hoxby, *The Rising Tide*, EDUC. NEXT, Winter 2001 at 69, *available at* http://educationnext.org/files/ednext20014_68.pdf (last visited August 2, 2010). The Milwaukee Parental Choice Program limits eligibility to those students who are also eligible for free and reduced lunches, thus the number of children who are eligible for the Choice Program varies greatly among the different Milwaukee public school campuses.

Dr. Hoxby compared academic achievement gains of schools heavily influenced by the voucher program to those less heavily affected (fewer students eligible). She also compared these two groups of Milwaukee schools (heavily and moderately impacted by vouchers) to a group of similar Wisconsin schools outside of Milwaukee that are completely unaffected by vouchers. *Id.* at 70-72. Dr. Hoxby found that those Milwaukee district schools with greater percentages of voucher eligible students enjoyed significantly higher academic achievement gains over lesser-impacted schools. Her results also demonstrated that both groups of Milwaukee schools made greater gains than the comparison group of Wisconsin schools. Schools with higher levels of competition for students demonstrated consistently higher academic gains. *Id.* at 73 74.

Dr. Hoxby's findings are not surprising when one considers the success of Florida's education reform measures, which currently provide the greatest degree of parental choice. Beginning in 1999, Florida implemented a strong set of education reforms that included creating a number of parental choice programs. Florida lawmakers mandated the letter grading (A-F) of all Florida public schools. All students attending a school receiving two failing (F) grades in any four-year period became eligible for school vouchers. Additionally Florida lawmakers created both the nation's largest scholarship tax credit program (Step Up for Students) and the nation's largest school voucher program (the McKay Scholarship Program) for children with disabilities.

Florida also created a strong charter school law, as well as the nation's strongest system of virtual schooling through the Florida Virtual School and other virtual schooling options. Finally, Florida policymakers enabled school funding to follow students down to the course level, with state funding for students in both district and charter schools paying for virtual schooling on a per-course prorated basis.

The National Assessment of Educational Progress (NAEP) tracks K-12 academic achievement across the country by administering academic achievement tests to random samples of students in various subjects and grade levels. As a result of The No Child Left Behind Act of 2001, all 50 states began participating in NAEP testing in 2003. NAEP administers four exams consistently: Fourth and eighth grade mathematics and reading. Florida has made more progress on these four NAEP exams than any other state since 2003 because of its education reforms.

Florida's NAEP progress is profound. Before enacting education reform, Florida was near the bottom of the NAEP rankings. Now, even traditionally low-performing student groups outscore a number of statewide averages for *all* students. For example, the average score for Florida's African American students (211) outscored or tied the statewide averages for all students in eight different states on the fourth grade reading NAEP. Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card: Reading 2009, available at* http://nces.ed.gov/nationsreportcard/pdf/main2009/2010458.pdf

(last visited August 2, 2010). Florida's 2009 cohort of African American fourth graders scored twenty-five points higher on the NAEP reading test than their 1998 predecessors.

Likewise, Hispanic students made enormous progress. On the 2009 fourth grade reading NAEP test, Florida's Hispanic students outscored or tied thirty-one different statewide averages for all students. Since 1998, the racial achievement gap between Florida's Hispanic students and the national average for Anglo students decreased from twenty-five points to six points on the NAEP fourth grade reading exam. *Id.*

Parental choice programs are partly responsible for these improvements. Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (February 2001), *available at* http://www.manhattan-institute.org/pdf/cr_aplus.pdf (last visited August 2, 2010). The Florida Department of Education contracted with Florida State University for an evaluation of the academic impact of the Opportunity Scholarship Program. Scholars at Florida State University collaborated with colleagues at Harvard University's Program on Education Policy and Governance to produce the report. The result was an analysis comparing the academic gains between Florida public schools in danger of receiving a second F grade in a four year period (thus triggering voucher eligibility for their students) and other under-performing schools (D-minus schools, so to speak). Researchers found significantly higher gains among

Florida's voucher-threatened underperforming schools. The scholars attributed the threat of competition as the impetus for larger student learning gains. *Id.* at 8-11.

Researchers also investigated the impact of Florida's McKay Scholarship (voucher) Program on the learning gains of children with disabilities who remained in public schools. Jay P. Greene and Marcus A. Winters, *The Effect of Special Education Vouchers on Public School Achievement: Evidence From Florida's McKay Scholarship Program*, MANHATTAN INST. CIVIC REPORT (April 2008), *available at* http://www.manhattan-institute.org/pdf/cr_52.pdf (last visited August 2, 2010). The evaluation found that children with disabilities in public schools facing higher levels of competition from the McKay Scholarship Program made statistically significantly higher gains than similar students in schools facing less competition. *Id.* at 8-10. "Our results . . . provide additional evidence that rather than being harmed, public schools respond to the challenge of exposure to school choice by improving the education they provide. These findings are consistent with most previous research, which demonstrates school-choice policies' positive effect on public school achievement." *Id.* at 10.

Finally, Northwestern University researchers studied the impact of Florida's "Step Up for Students" tax credit program and found a statistically significant and positive relationship between the number of participating private schools in proximity

to public schools and student learning gains. David Figilio and Cassandra M.D. Hart, *Competitive Effects of Means-Tested School Vouchers*, http://www.stepupforstudents.org/cms/10%20Public%20school%20impacts%20from%20Tax%20Credit%20Scholarships.pdf (last visited August 2, 2010). The Northwestern researchers conclude:

> Our results indicate that the increased competitive pressure faced by public schools associated with the introduction of Florida's FTC Scholarship Program led to general improvements in public school performance. Both greater ease of access to private school options (measured by the distance and density measures) and the variety of options that students have in terms of the religious (or secular) affiliations of private schools (measured by the diversity and concentration index measures) are positively associated with public school students' test scores following the introduction of the FTC policy.

Id. at 35.

To be clear, the research outlined above only partially attributes Florida's successful education reform to the State's parental choice policy. Nevertheless, this research is instructive because Arizona currently ranks towards the bottom on NAEP testing. *See* Nat'l Ctr. for Educ. Statistics, *State Educ. Data Profiles*, http://nces.ed.gov/programs/stateprofiles (last visited August 2, 2010). The State desperately needs every available tool to help improve academic achievement.

In 2010, Arizona adopted measures emulating Florida's K-12 education reform policies, such as requiring schools to be graded A-F, adopting alternative teacher certification and curtailing social promotion. S.B. 1286 (Ariz. 2010), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1286&Session_ID=93 (last visited August 2, 2010); S.B. 1040 (Ariz. 2010), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1040&Session_ID=93 (last visited August 2, 2010); H.B. 2732 (Ariz. 2010), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=HB2732&Session_ID=93 (last visited August 2, 2010). Arizona also improved and expanded parental choice programs. The legislature expanded the oversight and powers of the Arizona Department of Revenue over groups participating in the tax credit program and eased the use of the program for taxpayers. In addition, Arizona empowered universities to authorize charter schools.

Arizona anticipates that its education reform policies will help the State foster academic achievement vis à vis improved NAEP test scores. Florida's experience strongly suggests that parental choice improves public education and that Arizona's low-income and minority students will be the big winners if laws such as A.R.S. § 43-1089 are upheld.

CONCLUSION

Arizona does not force or coerce parents into using a tax credit scholarship, much less to send their children to sectarian private schools. Therefore, the Ninth Circuit's decision needlessly impairs parental choice as well as vital educational opportunities for Arizona's schoolchildren. The data presented in this brief underscores that the Ninth Circuit's decision departs from vertical *stare decisis* by ignoring the "unbroken line of decisions" that culminated in *Zelman*'s holding. 536 U.S. at 662-63. For these reasons, the Court should overturn the Ninth Circuit's ruling and uphold A.R.S. § 43-1089.

Respectfully submitted,

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August 6, 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 0 6 2010
OFFICE OF THE CLERK

No. 09-987, 09-991

In The

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.,
Petitioners,

v.

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds?

II. Is the Respondents' alleged injury – which is solely based on the theory that Arizona's tax credit reduces the state's revenue – too speculative to confer taxpayer standing, especially when considering that the credit reduces the state's financial burden for providing public education and is likely the catalyst for new sources of state income?

III. Does a tax credit that advances the legislature's legitimate secular purpose of expanding educational options for families unconstitutionally endorse or advance religion simply because taxpayers choose to direct more contributions to religious organizations than nonreligious ones?

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INTEREST OF AMICI CURIAE

The Framers and the citizens of the Founding Era took very seriously the idea that federal courts should not assume a supervisory role over state governments. Yet, as this case demonstrates, state officials are frequently sued in federal court by state taxpayers seeking to enjoin various government actions and programs on Establishment Clause grounds. *See also Pedreira v. Kentucky Baptist Homes for Children*, 579 F.3d 722 (6th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3566 (U.S. Mar. 16, 2010) (09-1121), 78 U.S.L.W. 3644 (U.S. Apr. 19, 2010) (09-1295); *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007); *Am. United for Separation of Church & State v. Prison Fellowships Ministry*, 509 F.3d 406 (8th Cir. 2007).

From the States' perspective, vigilance concerning Article III standing is required to avoid turning federal courts into fora "in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast v. Cohen*, 392 U.S. 83, 106 (1968); *see also Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007) ("[I]f every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.").

Even more to the point, maintaining proper limits on federal-court standing is necessary to prevent federal courts from becoming state fiscal monitors. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006). Just as federal courts scrutinize federal-

taxpayer-standing claims in order to avoid creating a system whereby "'the other departments would be swallowed up by the judiciary,'" *id.* at 341 (quoting 4 *Papers of John Marshall* 95 (Charles T. Cullen ed. 1984)), so too, federal courts must police state taxpayer standing claims to avoid swallowing state-government autonomy.

This Court has consistently equated federalism concerns with separation-of-powers concerns when faced with a decision whether to expand federal-court standing. *See, e.g., Allen v. Wright*, 468 U.S. 737, 759-60 (1984) (drawing a direct analogy between federalism and separation-of-powers principles); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982) (stressing that Article III "is a part of the basic charter . . . which . . . provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals"). This Court has also relied on federalism principles when rejecting the justiciability of citizen lawsuits for injunctive relief against state officials based only on past conduct. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 111-13 (1983); *Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974).

The *amici* States have a strong interest in urging this Court to adhere to these principles of federalism and in supporting Arizona's efforts to limit federal courts to their proper role in Establishment Clause cases.

Moreover, the amici curiae States have a substantial interest in improving the quality and accessibility of education for their citizens. That interest extends to private as well as public schools. Indeed, the U.S. Department of Education 2007-2008 survey of private schools reports that there were more than 33,700 private elementary and secondary schools nationwide serving over 5 million children, 2 million of which were in urban areas.[1]

Promoting charitable giving through tax incentives is an efficient and legitimate way to achieve the States' goal of improving the quality and accessibility of private schools. In fact, six States have enacted legislation similar to the program in Arizona designed to increase access to education: Florida, Georgia, Indiana, Iowa, Pennsylvania, and Rhode Island.[2] All the amici curiae States have an interest in ensuring the proper neutrality between government and religion – maintaining adherence to Establishment Clause principles, while protecting programs that rely on religion-neutral criteria and that do not hinder the independent decisions of private citizens. The reaffirmation of the principles from *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002), will ensure that this program and others will not fall when the State has not acted to advance or hinder religion but only given benefits to private citizens and allowed them to use the benefits as they see fit.

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[1] 2007-08 Private School Universe Survey, U.S. Department of Education, at 2.

[2] *See* Fla. Stat. § 1002.395; Ga. Code Ann. § 48-7-29.16; Ind. Code §§ 20-51-1-1 *et. seq.*; 6-3.1-30.5; Iowa Code §§ 422.11S, 422.12; 72 Pa. Cons. Stat. § 8705-F; R.I. Gen. Laws § 44-62-2.

SUMMARY OF ARGUMENT

Respondents allege that a state tax credit for donations to school tuition organizations, when those donations create scholarships to religious schools, causes "irreparabl[e] harm[] [to taxpayers] by the diminution of the state general fund." Both *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), and *DaimlerChrysler v. Cuno*, 547 U.S. 332, 344 (2006), generally preclude state taxpayer standing of this sort. Nonetheless, the court below accorded taxpayer standing based on the taxpayer standing exception created by *Flast v. Cohen*, 392 U.S. 83, 103 (1968). The *Flast* exception, however, has been reduced to a sliver. In *Hein v. Freedom from Religion Foundation*, 551 U.S. 587, 604 (2007), this Court limited *Flast* to its facts and made clear that taxpayer standing was permitted only for challenges directed at "specific congressional appropriation[s]" dispersed in accordance with a "direct and unambiguous" congressional mandate. This case, where the plaintiffs challenge tax credits rather than appropriation, and where the operative legislation does not direct that donations eligible for credits be made to religious schools, does not fit the *Hein* criteria.

What is more, Respondents' insistence that this case amounts to an as-applied challenge makes taxpayer standing completely untenable. If what Respondents really complain about, as they have argued for purposes of avoiding *res judicata*, is how the Arizona tax authorities have administered the program, then they are challenging not legislative directives, which *Flast* permits, but executive branch activity, which *Hein* precludes. Hence, to accord standing here would be to reverse course after *Hein* and expand the concept of taxpayer standing, this time

at the expense of States rather than the federal government.

Moreover, if this Court reaches the Establishment Clause issue raised by the State of Arizona, this Court should reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

This case provides a significant opportunity for this Court to reiterate that the controlling analysis under the Establishment Clause is whether a state program has the purpose or effect of advancing or inhibiting religion. Neutrality is the linchpin to the analysis. That is the primary holding of *Zelman v. Simmons-Harris*.

As long as the State has remained neutral in creating a program, providing benefits to taxpayers irrespective of religion, the fact that private citizens or organizations elect to direct money toward religious enterprises – or not to do so – reflects the decisions of private citizens, not the decisions of the State. The program created by the State of Arizona here is neutral regarding religion, and therefore does not have the purpose or effect of advancing or inhibiting religion.

The Ninth Circuit rejected the Arizona program because the taxpayers in providing support to student tuition organizations (STOs) may elect to support them for religious reasons and the STOs may decide to limit their support to religious schools for religious reasons. But these are the decisions of private citizens, not the government. The endeavor of quantifying the number of opportunities created by the STOs to measure whether parents have an equal amount of money to

attend private secular schools to attend as against private religious schools misunderstands the point. Such an analysis implies that the resolution of the question whether the program has the "effect" of advancing religion depends on the religious character of the citizens at issue, not the actions of the government. Where the government provides a benefit – here a tax credit – to a private citizen, who independently may decide to use the benefit in favor of religion, the citizen is the author of the decision, not the government. The Establishment Clause is not offended when citizens use benefits provided by the government religiously.

The Establishment Clause does not require that religion be quarantined from receiving some benefit from a state program before the constitutionality of the program may be affirmed. When a governmental program establishes religion-neutral criteria for conferring a benefit to its citizens, the private, independent decisions of those citizens operate as a circuit-breaker between the government and any private decisions to favor religion. These criteria satisfy the Establishment Clause, and the inquiry should end there.

This Court should reverse the United States Court of Appeals for Ninth Circuit.

ARGUMENT

I. Because no legislative appropriations are at stake, respondents cannot establish standing.

Respondents' assertion of taxpayer standing conflicts with this Court's Article III precedents. Article III requires federal-court plaintiffs to show a "concrete and particularized" injury that is neither "conjectural [n]or hypothetical." *Cuno*, 547 U.S. at 344. The complaint in this case is essentially that, as applied to donations that create scholarships to religious schools, a state tax credit for donations to school tuition organizations causes taxpayers some undefineable injury shared in common with taxpayers generally. Such a claim is insufficient to confer Article III standing, even if it arises under the Establishment Clause. *Id.*

A. Like federal taxpayers, state tax-payers may not challenge taxing and spending policies in federal court.

1. This Court long ago set forth the basic rule that Article III does not permit taxpayers to challenge in federal court the constitutionality of government taxing and spending policy. In *Frothingham*, this Court ruled that federal taxpayers had no standing to challenge a congressional appropriation creating a state-federal partnership targeting infant mortality and maternal health. *Frothingham*, 262 U.S. at 488. This Court observed that any particular taxpayer's interest in the federal treasury is "shared with millions of others" and therefore "comparatively minute and indeterminable"

such that "the effect upon future taxation, of any payment out of the funds" is too "remote, fluctuating and uncertain" to afford equity jurisdiction. *Id.* at 487.

As the decision below acknowledged, there is no doubt that the rules governing federal taxpayer standing carry over to state taxpayers. *See Winn v. Garriott*, 562 F.3d 1002, 1008 (9th Cir. 2009); Pet. App. at 9a ("This rule applies with equal force to taxpayer suits challenging an allegedly unconstitutional state action and those challenging federal action."). In *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429 (1952), this Court set the same course for state taxpayer standing as *Frothingham* did for federal taxpayer standing, expressly holding that, when it comes to taxpayer standing, "what the Court said of a federal statute [i]s equally true when a state Act is assailed . . . ." *Id.* at 434 (quoting *Frothingham*, 262 U.S. at 488). This Court stressed that a state taxpayer could satisfy Article III "only when it is a good-faith pocketbook action." *Id.* And it relied extensively on the relationship between the states and the federal government and noted that while state courts may entertain public-interest lawsuits brought by taxpayers, federal courts may not. *See id.* at 434.

More recently, in *DaimlerChrysler v. Cuno*, 547 U.S. 332, 344 (2006), the plaintiffs challenged an Ohio tax credit that induced DaimlerChrysler to maintain manufacturing facilities located within the State. *Id.* at 337-38. They claimed to have standing "by virtue of their status as Ohio taxpayers, alleging that the franchise tax credit 'depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments' and thus 'diminish[es] the total funds

available for lawful uses and impos[es] disproportionate burdens on' them." *Id.* at 342-43.

The "reduced revenue" theory was insufficient first because the impact of tax credits on the state fisc was speculative – "[t]he very point of the tax benefits is to spur economic activity, which in turn *increases* government revenue" – and second because there was no way to know whether invalidating the credits would benefit the plaintiffs as taxpayers. *Id.* at 344. Ultimately, a state taxpayer must have a claim for disgorgement of paid taxes from a state official – or a claim that a state official is about to deprive the taxpayer of money unlawfully through taxation – in order to sue that official in federal court *as a taxpayer*. *See id.* at 345-46.

2. This case, where the Respondents claim only that they have been "irreparably harmed by the diminution of the state general fund through the tax credit program," is indistinguishable. The tax credit at issue in this case, like the tax benefit awarded in *Cuno*, is intended to *improve* the State's financial position and *lessen* the burden on taxpayers. This Court has already recognized that programs increasing the affordability of private schools likely decrease a State's tax burden. *See Mueller v. Allen*, 463 U.S. 388, 395 (1983) ("By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers."). And by enabling more parents to send their children to private schools using scholarships, the tax credit may also encourage new private educational institutions to open and create new teaching, administrative, and management positions, all of

which would contribute to the State's tax base and lessen the burden on current taxpayers, including the plaintiffs. To say the least, it is speculative to say that tax credits create greater burdens for non-participating taxpayers.

Furthermore, Respondents cannot show that if the tax credit did not exist, they would pay a smaller amount on tax day. They have argued that money paid to religiously oriented STOs should go instead to the State, but even if so it does not follow that taxpayers would themselves realize any concrete benefits from that result. What happens to the money would be up to the Arizona legislature, and it might need to raise extra tax revenue to cover the cost of educating more children, as but one example of an alternative use that would not benefit the Respondents. Therefore, as in *Cuno*, the allegations of harm and redressability are far too speculative to sustain Article III standing.

B. Respondents do not challenge an appropriation directly supporting religious schools, so *Flast* does not apply here.

In according taxpayer standing in this case, the court below, rather than simply apply *Cuno*, erroneously relied on the exception to the *Frothingham* rule created by *Flast*. *Winn*, 562 F.3d at 1008-09; Pet. App. at 10a-11a. Neither *Flast* nor subsequent Establishment Clause cases extend federal court jurisdiction to this case.

1. A discussion of the parameters of *Flast* must actually begin with *Doremus*, which, as noted

above, held that state taxpayers pursuing Establishment Clause violations must allege "a good-faith pocketbook action" in which there is a "direct dollars and cents injury." *Doremus*, 342 U.S. at 434. The *Doremus* plaintiff lacked standing because he failed to identify any funds that had been used to facilitate the school's practice of reading Bible verses to start school. *Doremus* involved a "grievance [that] is not a direct dollars-and-cents injury but is a religious difference." *Id.* Litigating religious differences is insufficient for purposes of standing.

Doremus notwithstanding, this Court in *Flast* permitted federal taxpayer standing to challenge acts of Congress when "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Flast*, 392 U.S. at 102-03. The Establishment Clause provides one (indeed the *only*) "specific constitutional limitation" on the spending power that can justify taxpayer standing. Accordingly, this Court in *Flast* permitted an Establishment Clause challenge to grants authorized by the Elementary and Secondary Schools Act of 1965, and later permitted taxpayers to bring an Establishment Clause challenge against grants authorized by the Adolescent Family Life Act. *See Bowen v. Kendrick*, 487 U.S. 589, 618-20 (1988).

Not intending to jettison its Article III standing precedents entirely, however, this Court in *Flast* expressly declared the taxpayer/spending nexus test to be "consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* . . . ." *Flast*, 392 U.S. at 102-03. Perhaps in keeping with that assertion, *Flast* did not signal an era of ever-

expanding taxpayer standing in Establishment Clause cases. In fact, this Court has rejected taxpayer standing to assert an Establishment Clause violation through a transfer of property to a religious group, underscoring the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982).

To be sure, the decision below cited post-*Flast* cases decided on the merits by this Court where taxpayers challenged tax provisions or "indirect aid programs" that benefitted religious organizations. *Winn*, 562 F.3d at 1010-11; Pet. App. at 15a-16a (citing *Mueller v. Allen*, 463 U.S. 388, 390 (1983); *Comm. for Pub. Educ. & Religious Lib. v. Nyquist*, 413 U.S. 756, 789-90 (1973); *Hunt v. McNair*, 413 U.S. 734, 737-38 (1973); *Walz v. Tax Comm'n*, 397 U.S. 664, 666 (1970); *Zelman*, 536 U.S. at 645). But these cases hardly establish firm precedent that taxpayers can bring federal court lawsuits challenging tax credits that allegedly violate the Establishment Clause. Two of the cases originated in state court, where Article III's restrictions do not apply. *See Hunt*, 413 U.S. at 735-36; *Walz*, 397 U.S. at 666-67. And two more dealt with, among other things, actual legislative expenditures, not just tax deductions or credits. *See Nyquist*, 413 U.S. at 774; *Zelman*, 536 U.S. at 644-45. And in none did this Court actually address standing.

With regard to such arguably *sub silentio* precedents, this Court faced a similar situation in *Frothingham*, where it observed that prior cases had permitted taxpayer standing without expressly

addressing the issue. Yet this Court in no way felt constrained by those prior cases. *Frothingham*, 262 U.S. at 486 ("In cases where it was presented, the question has either been allowed to pass sub silentio or the determination of it expressly withheld.") (citing *Millard v. Roberts*, 202 U.S. 429, 438 (1906); *Wilson v. Shaw*, 204 U.S. 24 (1907); *Bradfield v. Roberts*, 175 U.S. 291 (1899)).

Even more important, in its most recent pronouncement on the subject, *Hein*, this Court clung to *Flast* as a matter of *stare decisis*, but also made it equally clear that *Flast* was limited to its facts. *Hein*, 551 U.S. at 604. In *Hein*, this Court refused to extend taxpayer standing to challenges of the Executive Branch's use of tax money to fund religious conferences and speeches. *Id.* at 605. This Court made clear that *Flast* only permitted taxpayer standing in challenges directed at "exercises of congressional power" under the Taxing and Spending Clause. *Id.* (quoting *Valley Forge Christian Coll.*, 454 U.S. at 479).

Under *Hein*, that is, taxpayers may challenge "specific congressional appropriation[s]" dispersed pursuant to Congress' Tax and Spend powers, provided that the appropriations in question were dispersed in accordance with a "direct and unambiguous" congressional mandate. *Id.* at 604. This nexus requirement is not met absent "the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion." *Cuno*, 547 U.S. at 348 (quoting *Flast*, 392 U.S. at 106). The requirement of "direct injury" requires taxpayer-plaintiffs to show that the State has extracted taxes from them, or has appropriated and spent public

monies, to fund a program that allegedly violates the Establishment Clause. *See Hein*, 551 U.S. at 603.[3]

2. The Respondents here cannot, under the *Hein* standard, "point[] to any specific appropriation of funds by the legislature to implement the program." *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584, 598 (7th Cir. 2007). Further, "[t]hey have *not* shown that the legislature has extracted from them tax dollars for the establishment and implementation of a program that violates the Establishment Clause." *Id.* at 599. The Arizona tax credit at issue does not unambiguously mandate that government funds be spent in support of religious schools, so Respondents do not have standing to challenge it as taxpayers.

Respondents lack standing for the exact reasons that this Court rejected standing in *Hein* and *Doremus*. They do not, and cannot, allege that taxpayer funds have been extracted from them to fund Arizona's tuition tax credit program. Arizona's tax *credit* program does not extract or appropriate any money at all. Private citizens, not the legislature, determine both the amount donated and the destination of funds

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[3] Notwithstanding *Hein*, to support its finding of taxpayer standing, the Ninth Circuit cited to opinions from this Court equating tax breaks with government assistance for substantive Establishment Clause purposes. *Winn*, 562 F.3d at 1009, Pet. App. at 13a. But whether government action benefitting religion has the same impact as a specific legislative appropriation for purposes of substantive Establishment Clause analysis does not inform whether taxpayer standing exists. Otherwise the Court would surely have been compelled to find standing in *Hein*.

by selecting charitable organizations of their own choosing.

In fact, when rejecting a facial challenge to the same tax credit program at issue in this case, the Arizona Supreme Court authoritatively decided that education funds raised through tax credits are private dollars, not public funds, as "no money *ever* enters the State's control" and "[n]othing is deposited in the state treasury." *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) (en banc); *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts.").

Arizona's tax credit program includes neither the extraction nor spending of "tax money," so it does not fit the model of taxpayer lawsuits permitted by *Hein*. *Kotterman*, 972 P.2d at 618.

3. In the court below, Respondents insisted that this case represents "an as-applied challenge, not to the statute's text, but to the program as it actually operates." Opp. Cert. at 15. They did this in order to avert the argument that they were barred by principles of *res judicata* from relitigating the facial constitutionality of the program in the wake of *Kotterman*. The Ninth Circuit accepted this argument, stating that Respondents were challenging facets of implementation rather than the legislation itself. *Winn*, 562 F.3d at 1007 n.3; Pet. App. at 6a-7a.

This gambit for avoiding *res judicata*, however, ultimately undercuts any remaining argument that

Flast applies. Again, *Hein* permits taxpayer challenges to *legislative* directives only. Yet from Respondents' point of view, this case apparently can only be characterized as an attack either on interpretive discretion exercised by the Arizona Department of Revenue or market behavior of private individuals in the wake of religion-neutral tax credits. And if what Respondents seek is a declaration that cabins the exercise of executive authority, *see Winn v. Hibbs*, 361 F. Supp. 2d 1117, 1118-19 (D. Ariz. 2005); Pet. App. at 50a-52a, then the case represents an attempt to achieve a marked expansion of the *Flast* doctrine that would countermand both *Hein* and this Court's otherwise consistent retreat from *Flast* over the past several decades.

* * *

Permissive treatment of state taxpayer lawsuits undermines our federalist structure by involving federal courts in the daily functioning of state bureaucracies. This Court has repeatedly emphasized that federal courts must respect principles of federalism when cases portend judicial regulation of state programs. *See Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (refusing to impose a tax levy for purposes of desegregation, stressing that "[o]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions"); *id.* at 58-59 (Kennedy, J., concurring) (categorically rejecting, on federalism grounds, the power of federal courts to mandate state-tax levies); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("[F]ederal courts in devising a remedy must take into account the interests of state

and local authorities in managing their own affairs, consistent with the Constitution."); *O'Shea*, 414 U.S. at 500 (holding that the need for proper balance in the federalist system counsels restraint against granting injunctions against state officers administering state laws) (citing *Younger v. Harris*, 401 U.S. 37, 46 (1971)). These same concerns apply in Establishment Clause cases, and consequently this Court should reject the expansion of taxpayer standing invited here.

II. There is no Establishment Clause violation when a State encourages charitable giving through a religion-neutral tax credit for the purpose of increasing access to all private education.

In determining whether a State program has the effect of advancing religion, it is the government's actions that are examined, not the actions of private citizens. Where the government has remained neutral on the issue of religion, the program does not have the effect of favoring religion – even if private citizens use the benefits they receive for religious purposes. The neutrality of government is the beginning and end of the analysis.

The Ninth Circuit erred in clothing the decisions of the taxpayers with the mantle of State action. The decision of many taxpayers to create religious STOs, and give money to religious STOs, which give scholarships for children to attend religious schools, reflects the choices of the taxpayers, not the State. The Establishment Clause does not require the State to make sure that its citizens act for only secular purposes once it has conferred a benefit on them. The

Ninth Circuit's analysis - if applied to other cases – would call into question other similar State programs as well as any number of programs that give benefits to citizens who then act independently to assist religious causes.

A. Neutrality is the linchpin for determining whether the program has the effect of advancing religion.

The critical issue here is whether a state program that is neutral to religion violates the Establishment Clause when its citizens independently decide to use the benefits from the program for religious purposes. This Court's decision in *Zelman* made clear that it does not. Neutrality is the key to this conclusion. As a matter of common sense, where the government enacts a policy that is neutral regarding religion, there is no violation of the Establishment Clause. The government is not responsible for the independent decisions of its citizens.

The First Amendment prohibits any law that establishes or inhibits the free exercise of religion. U.S. Const. amend. 1; *see Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). In particular, the Establishment Clause prohibits "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *Bowen v. Kendrick*, 487 U.S. 589, 611 (1988).

The basic standard for evaluating Establishment Clause challenges is outlined in *Agostini v. Felton*. There, this Court set forth a two part test for

determining whether a law violates the Establishment Clause: (1) did the government act with the purpose of advancing or inhibiting religion, and (2) does that action have the effect of advancing or inhibiting religion. *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997).[4]

In determining whether an action has the "effect" of advancing religion, this Court's analysis focuses on the nature of the government's actions – not the actions of private citizens. Where "a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Zelman*, 536 U.S. at 652. In reaching this conclusion, this Court reviewed other cases finding no constitutional violation where a government program benefitted a religious organization based on the "true private choice" rather than based on the actions of the government. *Id.* at 649 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (permitting sign-language interpreters to assist deaf children enrolled in religious school selected by the parents); *Witters v.*

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[4] *Agostini* essentially folds the "entanglement" prong of the *Lemon* test into the "effect" prong. *See Zelman*, 536 U.S. at 668 (O'Connor, J., concurring) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). The three primary criteria this Court uses to determine whether government aid advances religion under the second prong are: (1) whether there is governmental indoctrination; (2) whether the participants are defined by reference to religion; and (3) whether there is excessive entanglement between government and religion. *Agostini*, 521 U.S. at 234.

Washington Dep't of Servs. for Blind, 474 U.S. 481 (1986) (permitting vocational scholarships); and *Mueller v. Allen*, 463 U.S. 388 (1983) (permitting tax deductions for educational expenses)).

Under *Zelman*, any "incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652. True private choice breaks the "circuit" between state action and religion. *Id.* at 652.[5]

The program at issue in *Zelman* gave tuition aid to parents who then directly paid the private schools, 82% of which had a religious affiliation. *Id.* at 647. This Court restated the point that merely because a vast majority of a program's benefits go to religious schools does not answer the question whether the program itself is constitutional. *Id.* at 658. Indeed, such an analysis would lead to the "absurd" result of making a truly neutral program constitutional in States with low numbers of religious schools and unconstitutional in States with high numbers of religious schools. *Id.* at 657.

This Court also found no "financial incentive" that "skewed" the program toward religious schools, where there was a full range of religious and

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[5] "Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated." *Zelman*, 536 U.S. at 652.

nonreligious educational options available to parents. *Id.* at 653-56.

In this case, the State of Arizona's program is neutral because it is available to all Arizona citizens irrespective of religion. Citizens may choose to create an STO that donates scholarships to private religious schools or instead choose to create an STO that donates to private secular schools, or choose to create one that donates to both. *See* Ariz. Rev. Stat. Ann. § 43-1089(G)(2) and (3). If an STO is voluntarily created, citizens then may choose to donate "*voluntary* cash contributions" to an STO of their choice and receive the tax credit. Ariz. Rev. Stat. Ann. § 43-1089(A) (emphasis added).

The STOs then provide scholarships "to children to allow them to attend any qualified school of their *parents' choice*." Ariz. Rev. Stat. Ann. § 43-1089(G)(3) (emphasis added). The STOs may elect to donate scholarships to *both* private secular and private religious schools, or may limit themselves to only secular or religious schools. And parents always retain the ability to choose from a broad array of other educational options: public schools in different districts, charter schools, and homeschooling, in addition to private schools. Thus, Arizona does not steer parents toward religious schools through Section 1089. Instead citizens choose to create STOs and choose to fund STOs. And parents choose, from a wide assortment of educational settings, where to send their children. Section 1089 is neutral toward religion and therefore does not have the effect of advancing religion.

The analysis from *Zelman* applies equally here. Where numerous private choices determine the distribution of aid pursuant to neutral eligibility criteria, the government "cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Zelman*, 536 U.S. at 652-53 (quoting *Mitchell v. Helms*, 530 U.S. 793, 810 (2000)). Such an arrangement also eliminates the improper appearance of establishment because a reasonable observer is not likely to infer that the government is endorsing a religion through neutral criteria or the private choices of individuals. *Zelman*, 536 U.S. at 653. "[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Id.* at 655.

The Arizona program seeks to make private schools an affordable option by promoting charitable donations to organizations that provide grants and scholarships to students attending private schools. Consistent with *Zelman*, this program is constitutional.

B. The Ninth Circuit's fundamental error was failing to recognize that the independent decisions of the taxpayers in donating to the STOs did not reflect government action.

The Ninth Circuit found Arizona's program constitutionally defective under the Establishment Clause for two primary reasons: (1) the taxpayers have

constrained the options of parents by giving money to STOs that predominately give scholarships to only religious schools (85% of the money available); and (2) this process creates financial incentives for parents that skew the program toward religious schools. *Winn*, 562 F.3d at 1017, 1021-23; Pet. App. at 31a, 40a-45a.

The decision is wrong on both counts.

First, the Ninth Circuit ignores the critical distinction between State action and the private action of the taxpayers. The Ninth Circuit noted that taxpayers "have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons[.]" *Id.* at 1022; Pet. App. at 43a. But the conduct of the taxpayers is not attributable to the State. *See Zelman*, 536 U.S. at 652. The government need not ensure that citizens only use the resources given to them for secular reasons, as long as the reason for the program itself is secular. As noted by Judge O'Scannlain in dissent in *Winn*, the "self-evident fact is that by 'delegating' the choice to the taxpayers, the government already broke the circuit." *Winn v. Garriott (Rehearing Denied)*, 586 F.3d 649, 667 (9th Cir. 2009) (O'Scannlain, J. dissenting); Pet. App. at 107a.

The program's purpose here is to ensure a wide range of education opportunities for children in Arizona, including private schools, homeschooling, charter schools, and attending other public schools in which the children are not members of the district. These purposes are fulfilled by allowing taxpayers to give money to STOs to make more money available for the private schools.

The Ninth Circuit concluded that these taxpayers had the responsibility of advancing the secular purposes of the government because the Arizona program delegated a power ordinarily vested in a governmental agency to them. *See Winn*, 562 F.3d at 1020-21; Pet. App. at 39a-40a; *see also Winn (Rehearing Denied)*, 586 F.3d at 655-56 n.8; Pet. App. at 79a-80a. ("Educational policy is certainly a traditional government function, and the state's decision to reimburse contributions to private scholarship funds is indisputably an educational policy decision."). It concluded that the structure of the Arizona program "encourage[d]" taxpayers to use the tax credits to advance sectarian goals. *Winn*, 562 F.3d at 1022; Pet. App. at 44a.

But the provision of a tax credit for a donation of funds to a student tuition organization (a charitable organization) is just like a donation to a charitable organization, for which one may claim a tax deduction, an endeavor that no one expects a taxpayer to do for primarily secular purposes. The Ninth Circuit fails to acknowledge that taxpayers are not stewards of the government's money. Rather, the money here was that of the taxpayers. And allowing STOs to include private secular or private religious schools, as well as allowing taxpayers to support either religious or secular schools through their donations to STOs, is religiously neutral – it does not encourage the STOs or taxpayers in any specific direction.

The Ninth Circuit's analysis is also predicated on a misapprehension of the analysis in *Zelman*. The Ninth Circuit indicated that one of the reasons that the

Ohio program was constitutional in *Zelman* is that the parents had "incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations[.]" *Winn*, 562 F.3d at 1021; Pet. App. at 40a. But this point wrongly assumes that a child's educational interests might not include considerations of the religious upbringing of the child. As noted by Judge O'Scannlain in dissent, many parents – the parents in *Zelman* included – do consider religion in selecting private educational schools for their children. *See Winn (Rehearing Denied)*, 586 F.3d at 668 (O'Scannlain, J. dissenting); Pet. App. at 109a-110a ("I disagree with the panel's conclusion that parents are somehow less motivated to promote religious objectives than taxpayers generally.").

Second, the options of the parents were not constrained or "skewed" by the State of Arizona. The options created were determined by the market decisions of private citizens. *Winn*, 562 F.3d at 1016; Pet. App. at 29a. The Ninth Circuit focused on the fact that the statute allowed STOs to offer scholarships at only religious schools. *Id.* at 1006, 1022; Pet. App. at 5a, 43a-44a. Yet this opportunity also allows the STOs to *exclude* religious schools, providing an opportunity to limit the amount of money available for religious schools. The fact that 25 of the 55 STOs limit their funding to religious schools is a reflection of the decision of private citizens, not the government. Any limitation in number is not the result of the program, but rather reflects the private decisions of Arizona's citizens. As the dissent correctly observes, in a different community this same program could just as easily result in a total dearth of funding for religious

schools. *Winn (Rehearing Denied)*, 586 F.3d at 662 (O'Scannlain, J., dissenting); Pet. App. at 95a. The government need not wait until the citizenry grows less religious before it seeks to create opportunities for children to attend private schools.

In denying rehearing en banc, the Ninth Circuit indicated that other similar State programs (Florida, Georgia, Indiana, Iowa, and Rhode Island) require that every STO enable parents to obtain funding for either private religious or private secular schools. *Id.* at 651 n.4 (majority opinion); Pet. App. at 68a-69a. But like Arizona, at least four State programs -- Georgia, Iowa, Pennsylvania, and Rhode Island -- allow particular STOs to limit their scholarships to religious schools or secular schools.[6]

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[6] For Georgia – *See* Georgia Dep't of Edu., *2010 List of Student Scholarship Organizations as of July 12, 2010, available at* http://www.doe.k12.ga.us/pea_policy.aspx?PageReq=PEAHB1133 (follow "SSO List – 08/04/2010" hyperlink) (last visited August 5, 2010). For *Iowa* – *See* Iowa Advocates for Choice in Education, *Tax Credits for Contributions to Scholarship Organizations - 2009 Year End Summary Reports, available at* http://www.iowaadvocates.org/sto.html (last visited August 5, 2010). For *Pennsylvania* – *See* REACH Foundation: Educational Tax Credits, *List of Scholarship Organizations, available at* http://www.paschoolchoice.org/reach/cwp/view.asp?a=1367&q=568487 (follow "scholarship organizations" hyperlink) (last visited August 5, 2010). For *Rhode Island* – *See* Rhode Island Department of Revenue: Division of Taxation, *Tax Credits for Contributions to Scholarship Organizations – Summary of Scholarships Issued, available at* http://www.tax.ri.gov/Credits/2007summary.php (follow "F.A.C.E. of Rhode Island, "STEPS," and "The Foundation for Rhode Island Day Schools" hyperlinks) (last visited August 5, 2010).

It also should be no surprise that there might be more religious private schools. According to a 2007-2008 survey by the Department of Education, approximately 68% of the 33,700 private schools in this country had some form of religious affiliation. 2007-08 Private School Universe Survey, U.S. Department of Education, at 2. With more religious private schools, one would expect more scholarships to be available at religious private schools.

The Ninth Circuit's quantative inquiry is exactly the analysis rejected by this Court in *Zelman*. Justice Souter's position was that since 46 of the 56 schools participating in the program were religious, there was not a "wide array of private non-religious options." *Zelman*, 536 U.S. at 703, 704 (Souter, J., dissenting). As this Court explained, however, the imbalance was not caused by state action. *Id.* at 656-57 (majority opinion). In *Zelman* there were more opportunities to attend the private religious schools in Cleveland than private secular schools. While the vouchers in that case could be used at adjacent public schools, the other schools elected not to participate, leaving parents with the same limitation on available secular private schools as in this case. *See id.* at 647.

The existence of multiple layers of neutrality and true private choice should not be ignored. When, as here, there are multiple layers of private choice involved, it should be more – not less – difficult to violate the Establishment Clause. *Winn (Rehearing Denied)*, 586 F.3d at 662 n.10 (O'Scannlain, J., dissenting); Pet. App. at 95a ("The panel . . . suggest[s] that by filtering aid through multiple levels of private choice – rather than a single level – the state endorses

religion. But that makes no sense. How can *increasing* the separation between state and religion result in heightened government endorsement?") (emphasis in original).

A neutral tax credit does not lose its constitutional validity on the day when too many religious institutions participate. Rather, *Agostini* holds that "the proportion of aid benefitting students at religious schools [from private choice is] irrelevant to the constitutional inquiry." *Mitchell*, 530 U.S. at 812 n.6 (Thomas, J., plurality opinion). In the same way, in *Mueller v. Allen*, where 96% of parents used a deduction for tuition at religious schools, this Court stated:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. [*Mueller*, 463 U.S. at 401.]

Under the Ninth Circuit's theory, what is constitutional today could be unconstitutional tomorrow. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time" there are more scholarships for religious private schools. *Zelman*, 536 U.S. at 658. "Such an approach would scarcely provide the certainty that this field stands in need of, nor can [courts] perceive principled standards by which such statistical evidence might be evaluated." *Mueller*, 463 U.S. at 401. The standard

established by this Court in *Zelman* and reflected in the dissent in *Winn (Rehearing Denied)* is clear and is one rooted in common sense.

"The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren." *Zelman*, 536 U.S. at 655-56. Like Ohio, the program created by the State of Arizona does not coerce anyone. In fact, as noted by the district court, parents actually have financial incentives not to choose a private school from the wide array of options available in Arizona.[7]

Here, multiple layers of neutrality demonstrate that Section 1089 is neutral toward religion:

- Anyone can create a school-tuition organization for a broad array of purposes without regard to religious affiliation; these organizations are created by individuals, not the government; and the program offers no financial incentive that favors creation of an organization that provides scholarships to religious schools.

- Any taxpayer may receive the tax-credit for making a donation; individual taxpayers, not

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[7] While a student may attend public schools for free, the average scholarship awarded by a tuition organization in 2003 was $1,222, "a sum unlikely to cover all of the costs of private school attendance." *Winn*, 361 F. Supp 2d at 1121; Pet. App. at 57a. Furthermore, as discussed in the Petitioner's brief, Arizona offers a wide variety of schooling options outside of public and private schools. Pet. Cert. at 22.

> the government, select the organization to which they wish to donate; and there is no difference in the tax-credit based on religious affiliation

Moreover, no reasonable person would believe that a donation received or a scholarship used at a religious school somehow bore the imprimatur of the State.

C. There are broad implications to the States if a neutral program violates the Establishment Clause when too many people make independent private decisions that cause some financial benefit to reach a religious organization.

The cases in which this Court has found a constitutional violation involved statutes that differ from the program the State of Arizona created. For example, this Court has determined that the Establishment Clause is violated by a tax-exemption for the sale and distribution of periodicals by religious organizations where the benefits were confined to religious organizations so they cannot appear as anything other than state sponsorship of religion. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5, 17 (1989) (holding that tax exemption from sales tax for sales of religious publications violates the Establishment Clause). Also, this Court invalidated tuition reimbursement grants where the "effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Nyquist*, 413 U.S. at 783.

And this Court in *Zelman* explained that "we now hold that *Nyquist* does not govern neutral

educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." *Zelman*, 536 U.S. at 662. Just as in Ohio in *Zelman*, the State of Arizona does not single out religious programs for special consideration or different treatment than other similarly-situated secular programs.

The suggestion that a program that is neutral in concept and applied in a neutral fashion may violate the Establishment Clause has broad implications. If extended to other settings, the analysis suggests that neutral programs that this Court has expressly approved – like the deductions for textbooks in *Mueller* – are improper.

The basic justification for allowing tax deductions for private donations to religious charitable institutions is predicated on the idea that the conduct of the government is neutral and the government is not clothed with the private decisions of its citizens. *See* 26 U.S.C. §§ 170(a), 501(c)(3). Anyone can create a tax-exempt organization for religious or non-religious purposes, and taxpayers choose the organizations to which they wish to donate. The donation to religious "entities organized and operated exclusively for religious purposes" are deductible. *Hernandez v. Comm'r*, 490 U.S. 680, 683, 695 96 (1989). The effect of "encouraging gifts to charitable entities, including but not limited to religious organizations – is neither to advance nor inhibit religion." *Id.* at 696. Given that a taxpayer can receive a deduction for giving directly to a religious school under 26 U.S.C. § 170(a), it is difficult to see how giving indirectly through a school-tuition organization violates the Establishment Clause.

The same is true of tax exemptions for charitable religious organization. *See* 26 U.S.C. § 501(c)(3). Anyone can establish a charitable foundation for a religious or non-religious purpose. Individuals donate to foundations that, in turn, make grants to various charities. This neutral structure would not become unconstitutional if the majority of taxpayers donated to foundations supporting religious organizations. *See Walz*, 397 U.S. at 673 (stating that tax-exemption to a broad class of property owned by non-profit organizations such as hospitals, libraries, playgrounds, and churches does not single out one particular church or religious group or even religion at all).

The implications of the Ninth Circuit's analysis – if extended to other settings – would suggest that neutral programs are suspect when too many citizens choose an option that incidentally benefits religion. The list of government programs that provide a benefit to private citizens who may then use that benefit is wide and varied:

- Tax deductions for charitable contributions – if too many are made to religious organizations. *See* 26 U.S.C. § 170;

- Tax-exempt status for non-profit organizations – if too many have a religious affiliation. *See* 26 U.S.C. § 501(c)(3);

- Tuition assistance for soldiers – if too many choose to attend religious schools. *See* 38 U.S.C. § 3015;

- Tax-exempt development bonds – if too many buildings are built by religious organizations. *See Steele v. Indus. Dev. Bd.*, 301 F.3d 401 (6th Cir. 2002);

- State programs offsetting school expenses – if too many children are attending religious schools. *See* Fla. Stat. § 1002.395; Ga. Code Ann. § 48-7-29.16; 35 Ill. Comp. Stat. 5/201(m); Ind. Code §§ 20-51-1-1 *et. seq.*; 6-3.1-30.5; Iowa Code §§ 422.11S, 422.12; La. Rev. Stat. Ann. § 47:293(9)(a)(xiv); Minn. Stat. § 290.0674; Ohio Code §§ 3310.01-17, 3313.974-979; 72 Pa. Cons. Stat. § 8705-F; R.I. Gen. Laws § 44-62-2.

- Federal arson assistance for non-profit organizations – if too many are religious institutions. *See* 24 C.F.R. § 573.1 *et. seq.*;

- Aid under the Stafford Disaster Relief and Emergency Assistance Act of 1974 – if too many claimants are religiously affiliated. *See* 42 U.S.C. § 5172(a)(1)(B); http://www.justice.gov/olc/FEMAAssistance.htm (last visited August 5, 2010);

- Housing and Urban Development (HUD) Section Eight Housing Choice Vouchers – if too many use funds for lodging managed by religious organizations. *See* 42 U.S.C. § 1437f(o); and

- Federal Prisoner Rehabilitation Programs – if too many prisoners use services provided by

religious organizations. *See* 42 U.S.C. § 3797w(b).

The fact that more individuals have chosen to support religious organizations is not a function of the program itself, but a reflection of the community. The decisions of the Arizona's taxpayers and parents are private ones – reflections of "true private choice" – and therefore are not attributable to the government. *Zelman*, 536 U.S. at 662-63 ("[Ohio] permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.").

The Establishment Clause does not require that religion be "quarantined" from being the recipient of an incidental benefit from a private citizen merely because the government originally conferred that benefit to the private citizen. *See Roemer v. Board of Pub. Works*, 426 U.S. 736, 746-47 (1976) (Blackmun, J., plurality opinion) ("[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all. . . . Neutrality is what is required."). [8] Rather, there exists a common-sense coexistence that can be achieved by "not tolerat[ing] either governmentally established religion or governmental interference with religion," what this Court described as "benevolent neutrality." *Walz*, 397 U.S. at 669. Since the 1980s, "the general trajectory of [this Court's]

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[8] "The White House Office of Faith-Based and Neighborhood Partnerships forms partnerships between government at all levels and non-profit organizations, both secular and faith based, to more effectively serve Americans in need." http://www.whitehouse.gov/administration/eop/ofbnp/about (last visited August 5, 2010).

Establishment Clause cases has moved away from no aid separationism and toward the neutrality principle." Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 285, 290 (1999). And the Establishment Clause analysis should stop there – at neutrality. Applying that analysis here renders the conclusion that the tax benefit at issue is constitutional. In taking a truly neutral approach to religion, the most a State can do is draft neutral legislation – which Arizona has done.

CONCLUSION

The decision of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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Dated: August 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 0 6 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, *et al.*,

Petitioners,

GALE GARRIOTT,
in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* JEWISH TUITION ORGANIZATION, NEW WAY LEARNING ACADEMY, CATHOLIC TUITION ORGANIZATION OF THE DIOCESE OF PHOENIX, CATHOLIC TUITION SUPPORT ORGANIZATION OF THE DIOCESE OF TUCSON, AND LUTHERAN EDUCATION FOUNDATION, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Jewish Tuition Organization ("JTO"), New Way Learning Academy, Catholic Tuition Organization of the Diocese of Phoenix ("CTODP"), Catholic Tuition Support Organization of the Diocese of Tucson ("CTSO"), and Lutheran Education Foundation, Inc. ("LEF") are private, voluntary associations. All share a commitment to advancing educational diversity in Arizona through the development, maintenance, and expansion of vibrant private schools.

Along with fifty other school tuition organizations ("STOs") presently operating in Arizona, the JTO, CTODP, CTSO, and LEF serve the citizens and taxpayers of Arizona by collecting and administering funds contributed by individual and corporate taxpayers who take tax credits available under Ariz. Rev. Stat. Ann. §§ 43-1089, 43-1183, and 43-1184 (West. Supp. 2009), *as amended by* 2010 Ariz. Sess. Laws chs. 188, 292 & 293, *reproduced in part at* Garriott App. 1-17. New Way is a non-religious private school that participates in a different STO. Each of *amici* is a § 501(c)(3) Arizona non-profit corporation.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the clerk.

Jewish Tuition Organization

The JTO was formed in 1999 to support Jewish day school education in the Phoenix area. It was organized by concerned members of the Jewish community, and its board of trustees consists of community members and representatives appointed by each of the six currently participating schools.

Measured by 2009 contributions, the JTO is the sixth-largest Arizona STO. Using the Arizona Department of Revenue's published data,[2] during 2009 it received $1.591 million from 2,344 contributors and, based on 2008 contributions, distributed 435 scholarships worth $1,705,941. The average grant was $3,921.70, among the state's highest.

The JTO awards all scholarships to students based solely on their families' demonstrated financial need, and students may use the scholarships at the participating Jewish day school of their choice. All contributions flow into a general fund, and contributors are not permitted to designate or recommend recipient students or schools.

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2. *See* Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009*, apps. I-II (2010) [hereinafter *ADOR 2009 Reporting*], *reproduced at* Garriott App. 18-49 *and available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2009.pdf (last visited Aug. 3, 2010).

The JTO develops and administers a grant formula that takes into account such factors as available scholarship funds; family gross income, discretionary income, and net worth; the number of children in the family needing aid; and tuition and other expenses. The JTO's formula is applied based on a review of tax returns and other documentation by a panel of volunteer accountants and a subsequent appeal process. In 2009-2010 approximately half of the students receiving JTO grants were from low-income families with earnings of $30,000 or less, and over fifty percent of the first round of scholarships for the 2010-2011 school year went to students in such families, which range in size from a single parent with one child to a family of eleven. Many students receiving assistance live at or below the poverty line.

While some JTO contributors do not take the STO tax credit, most of the contributions are made by individuals who intend to take advantage of it, and the JTO solicits contributions on the basis of the tax credit. Without the JTO's credit-financed scholarships, hundreds of children each year would be unable to afford to continue in their schools. Even with the tax credit, the JTO is unable to meet all of the serious financial needs of scholarship applicants.

New Way Learning Academy

New Way is Arizona's only non-profit, private K-12 school specializing in educating children with learning differences, including dyslexia, AD/HD, and other issues. Founded in 1968, the Scottsdale school, which has no religious affiliation, is approved by the Arizona

Department of Special Education to serve students with learning disabilities, and its faculty includes certified special education teachers and reading specialists, a speech-language pathologist, an occupational therapist, and certified academic language therapists. New Way offers a student/staff ratio of 6:1 and develops individualized education plans carefully crafted around the student's educational needs and abilities as identified through comprehensive assessments of speech/language skills, motor skills, and more.

New Way participates in New Valley Education Partners, an STO that grants scholarships to students who attend three non-religious Arizona schools: New Way, Tesseract School, and Verde Valley School. The cost of such specialized education is significant, and in 2009 twenty-six New Way students received need-based scholarships totaling over $205,000. The STO tax credit is crucial to New Way's ability to continue to provide unique educational opportunities for its students.

Catholic Tuition Organization of the Diocese of Phoenix and Catholic Tuition Support Organization of the Diocese of Tucson

The CTODP, which was established in 1998, and the CTSO, which was established the following year, consistently distribute at least ninety-five percent of funds raised from Arizona taxpayers as scholarships to enable families choose schools owned and operated by Arizona's two Roman Catholic Dioceses.

Both Catholic STOs serve an ethnically, economically, and religiously diverse community covering nearly the

entire State of Arizona, including the counties of Maricopa, Mohave, Yavapai, Pima, Pinal, Gila, Yuma, La Paz, Santa Cruz, Cochise and Coconino. They also serve children from the Tohono O'odham, San Carlos Apache, Navajo, and Gila River Indian Reservations.

In 2009-2010 just under half of the 9,581 preschool and elementary students in the Catholic schools in the Diocese of Phoenix were from minority communities, and nearly a quarter (2,277) were enrolled in subsidized meal programs. Although the CTODP's application forms do not ask about the student's or family's religious preference, it knows from other sources that twenty-six percent of the students in its six secondary schools identified themselves as "non-Catholic."

In the Diocese of Tucson, more than sixty-seven percent of the 5,146 preschool and elementary students in the Diocesan schools were from minority communities, and twenty-five percent (1,328) were enrolled in subsidized meal programs. Twenty-one percent of the students in its six secondary schools identified themselves as "non-Catholic." CTSO's applications do not ask about religious preference.

CTODP figures for 2010-2011 show that over sixty percent of the first round of scholarships went to students in families earning $50,000 or less. Family sizes range from single-parent/single-child to fourteen. Over twenty percent of the students receiving awards from individuals and corporations lived at or below the poverty line, and *nearly all* other awards went to families with demonstrated financial need based on a formula developed by the CTODP and administered by

an independent contractor. Factors include family income, expenses, net worth, discretionary income and tuition. 68.5% of CTODP and 77.5% of CTSO recipients whose ethnic origin was known identified themselves as American Indian, Native Alaskan, Asian, African American, Hispanic, Native Hawaiian, Pacific Islander, or multi-racial. More than forty-five percent of CTODP and fifty-six percent of CTSO students identified themselves as Hispanic. At least 4.4% of CTODP (275) and 9.5% of CTSO (320) awards served Native American children.

The selection of recipients and allocation of funds are based on the number of students with demonstrated need who apply at each qualified school, severity of need, and the amount of school-designated donations received. Both STOs raise general, "undesignated" funds to help students whose schools are unable to meet the financial needs of applicants through their own school-designated donor contributions alone. In 2009-2010 six hundred students were unable to matriculate at, or dropped out of, the school of their choice, largely because there were not enough CTODP funds available to fill the gap between their ability to pay and the tuition rate.

At current contribution levels, neither STO can meet this need. Although CTODP received $9.17 million from 13,712 contributors in CY2009 and distributed 5,040 scholarships worth $9,377,207, the average award was only $1,860.56. The CTODP's independent evaluator estimates that the level of level of qualified need for 2010-2011 is approximately $24,125,327. In 2009 CTSO received $6.55 million from 8,985 contributors, and distributed 3,378 scholarships worth $6,499,448, with an

average scholarship of $1,924.05. CTSO estimates that demand for scholarships to attend the schools it serves exceeded the available supply of funds by approximately $2,015,552 (thirty percent).

Lutheran Education Foundation, Inc.

The LEF was organized in 1997 with the goal of assisting students to attend any of the Lutheran schools in the state of the students' choice, and sixteen schools currently participate. In 2009, the LEF received $120,261 from 198 contributions, and based on the prior year's contributions made 82 scholarship grants worth a total of $155,000 to students attending ten schools. To date, the LEF has designated 100% of the donations received toward scholarships, with no amounts used for administrative costs.

The LEF awards scholarships solely on the basis of financial need. To ensure that only the most needy students receive funds, donors may not recommend student recipients, but may specify a qualifying Lutheran school. Parents submit applications to an independent outside evaluation service, FAIR of St. Paul, Minnesota, which computes the suggested scholarship amount, and the LEF's Board of Directors makes the final determination. Factors include gross income, net worth, employment stability, debt obligations, living expenses, and other financial considerations. Those with financial need are given priority rankings, with higher priority afforded those who were funded in prior years and have serious financial need. For the LEF's latest scholarship recipients, the average family gross income was $33,194, and the average discretionary income (gross income less living expenses) was negative $9,061.

SUMMARY OF ARGUMENT

The Ninth Circuit's interpretation of the Establishment Clause turns the First Amendment on its head by restricting the ability of STOs and the constituencies they represent to express their viewpoints and compete in the educational marketplaces Arizona has created. At one level, Arizona has pursued a broad, neutral program of school choice, allowing parents to educate their children at any public district or charter school, by home schooling, or by selecting a private school. To compensate for the inherent cost advantage enjoyed by public schools, the Arizona Legislature created STO tax credits to encourage individuals and corporations to invest in private education, which the state itself cannot fund under the Arizona Constitution regardless of content.

The STO tax credits are only one component of a neutral and "genuine" system of tax and education laws that permits Arizona taxpayers and others to invest in both public and private education and to form and finance a variety of expressive associations to support the kinds of educational opportunities in which they believe. When all of the tax credits are viewed together, the taxpayers' voluntary contributions to public and private nonreligious education exceed their contributions to private religious education.

At a second level, STOs compete among themselves and with public schools for tax-credit-eligible contributions. STOs are private actors organized to support private education. Other private actors—including parents, schools, and community groups—are

free to create an STO that advances an educational agenda or experience unavailable in district, charter, or home schools. STOs freely decide which private schools will advance their goals, whether all of the schools or a subset defined by a wide variety of limiting principles *for both schools and scholarships*: geography, special needs, culture, extreme financial need, pedagogical philosophy, shared non-sectarian school characteristics, self-selected school groupings, and religious instruction. Each STO must convince each taxpayer each year to take advantage of the tax credit *and* to contribute to that particular STO. Like any listener in the public square, taxpayers are free to say "no."

Respondents do not object to the existence of STOs generally, or to the eligibility of non-religious STOs that support only schools organized around a particular educational method or certain children's special needs. They challenge *only* those STOs that choose to provide scholarships solely to students whose parents choose religious schools. But those are private choices, and Arizona has remained completely neutral concerning the placement of children and scholarship dollars in religious or non-religious schools. In contrast, the Ninth Circuit's position is not neutral, but rather requires Arizona to exclude religiously-based expressive associations from the otherwise-free educational marketplace unless they change the very viewpoints that make them unique and allow them to attract contributors. The Establishment Clause simply does not impose such constraints on private choices by private parties.

ARGUMENT

Petitioners have explained in their respective briefs how the Ninth Circuit panel's decision conflicts with this Court's opinions in *Mueller v. Allen*, 463 U.S. 388 (1983), *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and other cases, as well as Arizona state court decisions upholding both the individual STO tax credit at issue here, *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 810, 921 (1999), and Arizona's more recently enacted corporate STO tax credit, *Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App.), *review denied* (Ariz. Oct. 27, 2009).[3] *Amici* will discuss the context and manner in which STOs operate, and show how they reflect and effectuate the private choices of parents, schools, and taxpayers, free of any government endorsement of, hostility to, or preference for religiously-based education.

In fostering a system of primary and secondary education that is open to choice, competition, and innovation, the Arizona Legislature has created two different but related marketplaces for ideas and

3. In 2006 the Arizona Legislature enacted a tax credit for corporate contributions to STOs that fund scholarships for students whose family income does not exceed 185 percent of the income limit for federal reduced-price lunch programs, and who transfer from public to private school. *See* Ariz. Rev. Stat. Ann. §§ 43-1183, 43-1504(A), *as amended and enacted by* 2010 Ariz. Sess. Laws ch. 292, §§ 3, 5. In addition to this credit, which was upheld in *Green*, in 2009 the Arizona Legislature created a separate corporate tax credit for contributions to STOs that fund scholarships for children with disabilities or in foster care. *See* Ariz. Rev. Stat. Ann. § 43-1184(Q)(3) (West Supp. 2009).

expression. In the first, all public and private schools in the state compete for students and their families. *See infra* Part I. In the second, a vast variety of STOs, often organized on the basis of philosophical, pedagogical, religious, or other principles strongly held by their respective constituencies, compete among themselves and with public schools and other causes for taxpayer contributions. *See infra* Part II. Arizona has been so expansive in its openness that these two expressive marketplaces approach, if not reach, the status of being limited public forums. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (holding that the Student Activities Fund "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable"). But the Court need not resolve that public-forum labeling issue here.

Instead, this Court need only decide that, as the eight Ninth Circuit judges who dissented from the denial of rehearing en banc recognized, the panel has turned the First Amendment on its head. The Arizona Legislature has sought to protect and facilitate Arizonans' exercise of their constitutional rights to educate their children in the manner they see fit, including the due-process rights to choose a private school (including a private *religious* school), *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925), and to have children "acquire useful knowledge" in particular subjects, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). "*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion." *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting).

To make such choices practicable, the Arizona Legislature has taken the path of liberty by enabling individuals to associate together in STOs to help fund the types of educational opportunities in which they believe. The panel's insistence that each STO be all things to all people and offer religious and non-religious options would undermine that freedom of association and thereby cripple STOs in recruiting the private contributors who make school choice real. *See infra* part III. In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 891 (2010), this Court observed that "Courts, too, are bound by the First Amendment," and for this reason *amici* submit that the Ninth Circuit panel's opinion should be reversed.

I. Arizona Has Created a Vibrant Educational Marketplace in Which STO-Sponsored Private Education Is but One Set of Voices.

A. The Arizona Legislature Has Enacted a Comprehensive Program of Public and Private School Choice.

In *Zelman v. Simmons-Harris*, 536 U.S. 639, 655-56 (2002), this Court held that the "constitutional fact" that triggers an Establishment Clause violation in a school choice case "is whether [a State] is coercing parents into sending their children to religious schools." The inquiry in *Zelman* began "by evaluating *all* options Ohio provides Cleveland schoolchildren." *Id.* The constitutional inquiry here similarly must begin with the undisputed fact that the Arizona STO tax credit is only one aspect of a dynamic public and private marketplace of educational ideas and programs available to Arizona

families. Arizona has sought to advance the secular goal of improving the quality of education by expanding educational options of *all* kinds and promoting competition among public schools, among private schools, and between public and private schools.

In 1994—three years before the STO tax credit was enacted—the Arizona Legislature authorized charter schools to "provide additional academic choices for parents and pupils" and to "serve as alternatives to traditional public schools." Ariz. Rev. Stat. Ann. § 15-181(A) (West 2009). Public charter schools operate independently of the local school district and offer a variety of educational philosophies, programs, and approaches.[4] There are charter schools that focus on "great books" (the Great Hearts Academies), other educational methods (the Montessori Charter School of Flagstaff), the arts (the Arizona School for the Arts), the sciences (the Academy of Math and Science), on-line education (the Arizona Virtual Academy),[5] and a variety of other needs and target communities. Of the more than 4,000 charter schools in the United States, 502 are in Arizona.[6] They represent a quarter of all

4. *See* Arizona Department of Education, *Charter School Search*, http://www.ade.state.az.us/charterschools/ (last visited Aug. 3, 2010) (searchable list of charter schools by location, target population, charter holder, calendar type, and type of school).

5. *See* Arizona Virtual Academy, http://www.k12.com/azva/ (last visited Aug. 3, 2010).

6. *See* Arizona State Board for Charter Schools, *School Search*, http://www.asbcs.az.gov/parent_resources/school_search.asp (last visited Aug. 3, 2010).

public schools in the state, and enroll over 101,000 students—ten percent of Arizona's public school population.[7]

In 1995, the Arizona Legislature increased the competition among public schools by requiring that "[s]chool district governing boards shall establish policies and shall implement an open enrollment policy without charging tuition." Ariz. Rev. Stat. Ann. § 15-816.01(A) (West Supp. 2009). The statute authorizes the governing board of the school district educating the pupil to "provide transportation" to adjacent districts for children with disabilities and with limited means. *Id.* § 15-816.01(B)-(C). Other students can obtain transportation up to "twenty miles each way to and from the school of attendance or to and from a pickup point on a regular transportation route." *Id.* Spurred by the open-enrollment mandate, public school districts around the state now offer a variety of curricula, educational approaches, and methods, including "traditional academies."[8]

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7. *See* Arizona Charter Schools Association, *About Arizona Charter Schools*, http://www.azcharters.org/pages/schools-basic-statistics (last visited Aug. 3, 2010).

8. *See, e.g.*, Tucson Unified School District, *Directory – Schools*, http://tusdstats.tusd.k12.az.us/planning/eprofile/leadership.asp (last visited Aug. 3, 2010); Flagstaff Unified School District, *Our Schools*, http://www.fusd1.org/1927107271 22731313/site/default.asp (last visited Aug. 3, 2010); Chandler Unified School District, Hill Learning Academy, http://www.mychandlerschools.org/20132092512471621 3/site/default.asp (last visited Aug. 3, 2010) (program focuses on individual student achievement or remediation in the core junior

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Arizona parents and children may also elect to educate their children at home or to send them to private schools. *See* Ariz. Rev. Stat. Ann. § 15-802(A) (West 2009) ("The person who has custody of the child shall choose a public, private, charter or home school as defined in this section to provide instruction."). Under the Arizona Constitution, however, they must do the latter at their own or other private expense: A constitutional provision forbids any "tax . . . or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." Ariz. Const. art. IX, § 10; *see Cain v. Horne*, 202 P.3d 1178, 1182-84 (Ariz. 2009) (invalidating voucher program for children with disabilities or in foster care because "[t]he Aid Clause prohibits the use of public funds . . . to aid private or sectarian schools").

District and charter schools are both publicly funded and tuition-free; private schools are neither. These financial considerations favor school districts and the formation of additional charter schools,[9] and make it likely that most students and educational innovators will

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and senior high school curriculum); Tucson Unified School District, Booth-Ficket Magnet School, http://edweb.tusd.k12.az.us/Booth_Fickett/index.asp (last visited Aug. 3, 2010) (math & science); Chandler Traditional Academy—Freedom Campus, http://www.mychandlerschools.org/2008206171728 45820/site/default.asp (last visited Aug. 3, 2010) (offering Spalding phonics and Saxon Mathematics programs).

9. *See* Arizona Charter Schools Association, *Start Your Charter School*, http://www.azcharters.org/CharterStarter (last visited Aug. 3, 2010).

end up in public schools. *See* Erica Schacter Schwartz, *Why Pay for Religious Schools When Charters Are Free?*, Wall St. J., June 12, 2009, at W13 ("This mix of charter and after-school tutorial is the model that presents a real challenge to private, religiously focused day schools."). Indeed, in July 2010, one of Arizona's largest Jewish day schools applied to become a non-religious public charter school that emphasizes Hebrew-language instruction.[10] Those who seek to learn or teach what public schools do not or cannot offer are at a decided disadvantage that Arizona's tax credits attempt to mitigate.

B. The STO Tax Credit is Part of a Neutral, Generally Applicable "Genuine System of Tax Laws" to Encourage Private-Sector Investment in a Variety of Beneficial Activities, Including Public and Private Schools.

In light of the law and economics of education finance in Arizona, the Legislature can offset (at least in part) the cost advantage enjoyed by publicly funded district and charter schools only by using its tax powers to encourage the private sector—parents, community organizations, interested individual and corporate taxpayers, and others—to create and sustain organizations that will raise and administer the funds parents need. The STO tax credit achieves that purpose in a lawful and practical way. *Compare Kotterman*, 972 P2d at 617-21 (individual STO tax credit is consistent with Ariz. Const. Art. IX, § 10), *and Green*, 212 P3d at

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10. Josh Sayles, *Jess Schwartz submits charter-school application*, Jewish News of Greater Phoenix, July 16, 2010, at 1.

105-06 (corporate STO tax credit is consistent with Art. IX, § 10), *with Cain*, 202 P.3d at 1182-84 (voucher grants payable to school of student's choice violate Art. IX, § 10).

Just as *Zelman* requires courts to consider "*all* options" available to Arizona parents and children, 536 U.S. at 655-56, so too does it require courts to consider all options available to Arizona *taxpayers*. Arizona uses tax credits to encourage a wide variety of private investments in both charitable and other activities and infrastructure that will, in the Legislature's judgment, advance the public interest.[11]

In particular, the Arizona Legislature provides several tax credits that encourage private contributions to *public and private* education, and the panel erred in suggesting that Respondents might be able to use contribution statistics under the STO tax credit, considered in a vacuum, to prove that the Arizona

11. *See, e.g.*, Ariz. Rev. Stat. Ann. § 43-1088 (West Supp. 2009) (individual credit for contribution to charities providing assistance to the working poor); Ariz. Rev. Stat. Ann. § 43-1086 (West Supp. 2009) (individual credit for donations to the Military Family Relief Fund); Ariz. Rev. Stat. Ann. §§ 43-1087, 43-1175 (West 2006) (individual and corporate credits for employment of Temporary Assistance for Needy Families recipients); Ariz. Rev. Stat. Ann. §§ 43-1075 to -1075.01, 43-1163 to -1163.01 (West Supp. 2009) (individual and corporate credits for motion picture production and infrastructure); Ariz. Rev. Stat. Ann. §§ 43-1083, 43-1085 (West 2006 & Supp. 2009) (individual credits for solar energy devices); Ariz. Rev. Stat. Ann. §§ 43-1090, 43-1176 (West 2006) (individual and corporate credits for solar hot water heater plumbing stub outs and electric vehicle recharge outlets).

Legislature created that tax credit to advance religion. *See, e.g.*, Garriott Pet. App. 84a-86a (concurrence). Ariz. Rev. Stat. Ann. § 43-1089.01 (West Supp. 2009), adopted at the same time as the STO tax credit, provides a tax credit for contributions to a *public* school for the support of extracurricular activities or character education classes (public schools are already tuition-free). In addition, Ariz. Rev. Stat. Ann. § 43-1089.02 (West Supp. 2009) provides a tax credit for up to thirty percent of the value of real property and improvements donated to a *public* school district or charter school for use as a school or as a site for the construction of a school.

All of these tax credits are components of "a genuine system of tax laws" that encourages private investment. *Mueller*, 463 U.S. at 396 n.6. The credits are generally available to all Arizona taxpayers with taxes to offset, and the state is neutral regarding the perspective of those who take advantage of them. *See Mueller*, 463 U.S. at 398-99 ("[A] program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause"), *cited in Zelman*, 536 U.S. at 661; *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 487 (1986) ("Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited'" (quotation omitted)).

To evaluate whether, in the panel's words, Arizona's tax-credit program "would result in *disproportionate* funding being made available only for use at religious institutions," Garriott Pet. App. 83a (concurrence) (emphasis added), one has to look at *all* of the private

funding being made available via Arizona's education tax credits for use at *non*-religious institutions, including district and charter schools. The following table shows that the total of the public-school tax credits taken each year roughly matches (and in some years exceeds) the amount of the private-school tax credits: The aggregate for 2002-2009 is 49.15% for public schools and 50.85% for private schools.[12]

Education Tax Credit Totals
(in millions)

Year	Public School	Private School
2002	$17.53	$17.62
2003	$22.87	$24.92
2004	$24.84	$26.17
2005	$29.8	$29.45
2006	$34.47	$31.87
2007	$41.43	$42.19
2008	$50.93	$51.01
2009	$46.4	$54.3
Total	$268.27 (49.15%)	$277.53 (50.85%)

12. The public-school figures include the tax credit for donation for extracurricular and character education and the tax credit for donation of property and improvements to district and charter public schools. *See supra* pp. 18-19. The chart is based on the Arizona Department of Revenue's estimates published in its yearly reports for Fiscal Years 2001/02 through 2008/09. Arizona Department of Revenue, *Tax Expenditure Reports*, http://www.azdor.gov/ReportsResearch/TaxExpenditures.aspx (last visited Aug. 3, 2010).

But Respondents' challenge distinguishes between non-religious and religious, not public and private, and the 50.85% figure for private schools includes religious *and* non-religious schools. If, as Respondents have always conceded, *see* ACSTO Pet. App. 122a, a substantial amount of the funds from the STO tax credit ends up at non-religious schools, then the total tax-credit funds that go to non-religious schools (including district, charter, and private schools) outweigh those that go to private religious schools. The Arizona Department of Revenue's report of the actual amounts claimed in 2009, for example, shows that when the religious and non-religious STO contributions are disaggregated, public schools and non-religious STOs receive over two-thirds (68.12%) of the available *private* tax-credit funding.

2009 Education Tax Credit Totals[13]			
All	**Non-Religious** $65,293,876		**Religious** $30,561,502
31.88%	Public 46.95%	Private 21.17%	31.88%
$95,855,378	$45,002,293	$20,291,583	$30,561,502
Total	**68.12%**		**31.88%**

13. This chart is also based on the Arizona Department's published reports. *See supra* note 12. The private-school tax-credit figures for 2009 are based on actual figures reported by the Department of Revenue for Fiscal Year 2008/09 and were disaggregated by using the names of the STOs receiving the donation.

This need to adjust the data properly attests to the wisdom of the Court's observation that "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401; *see Zelman*, 536 U.S. at 657 ("attribut[ing] constitutional significance" to a high percentage of participating religious schools "would lead to the absurd result that a neutral school-choice program might be permissible" in some areas or states but not others). Whether and on whom Arizona's facially neutral tax credits will have a "disproportionate" impact is a conclusion drawn in the eye of the beholder. The power to decide which STOs receive money rests in the hands of the private taxpayers who decide which credits to take and which organizations they wish to support from year to year. Annual statistical analyses prove only that taxpayers are free to make different choices each year. This is all the First Amendment requires. *See also Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990) (upholding a neutral tax law of general applicability against a free-exercise claim based on alleged disproportionate impact); *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) ("the First Amendment has not been offended" if generally applicable and otherwise-valid legislation has the incidental effect of "prohibiting the free exercise of religion").

II. Arizona's STO Tax Credit Creates a Marketplace for the Expression of Viewpoints.

A. Arizona's School-Choice Program Provides Four Layers of Private Choice.

In addition to the market for schools and students, the Arizona Legislature has created yet another dynamic market in which educational, business, charitable, professional, religious, and governmental organizations compete to convince other private actors—Arizona taxpayers—to provide the private funding encouraged by Arizona's many tax credits and deductions.[14] STOs are private actors organized by individuals who associate themselves for the collective purpose of supporting private education, whether generally or at a selected group of schools. Garriott Pet. App. 21a-22a (concurrence) (noting that STOs are not state actors). Private schools are, by definition, private actors which organize, solicit students and support, and associate with STOs that share their vision of a quality educational experience. Indeed, the Ninth Circuit has recognized that Arizona charter schools, though publicly funded, are themselves private actors. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F3d 806 (9th

14. Arizona taxpayers must choose, on an annual basis, to claim the tax credit or the charitable deduction for contributions to STOs. *See* Ariz. Rev. Stat. Ann. §§ 43-1089(E), 43-1089.01(C). Because the taxpayers can claim a variety of credits, and the amount they can claim in any given tax year depends on the amount of taxes they owe before the credit is applied, the value of any deduction or credit *to the taxpayer* (rather than to an "objective observer") will necessarily depend on the taxpayer's specific circumstances.

Cir. 2010) (rejecting argument that charter schools are state actors for purposes of 28 U.S.C. § 1983). Associations of teachers, parents, and students also are private groups with deep, abiding interests in the quality of the educational experience of Arizona's public- and private-school children. In fact, the only "state actors" are Arizona's public schools, which must freely compete for a share of tax-credit-eligible donations.

Freedom of educational choice in Arizona is thus guaranteed by *four* layers of private choice. *First*, parents are free to choose to educate their children at any public school, to educate them at home, or to select a private education. *Second*, private citizens—including parents—are free to create an STO that advances educational agendas or experiences that are unavailable in a district-, charter- or home-school setting. If existing STOs do not adequately serve the needs and interests of particular groups of parents or schools, then those groups can and do create new STOs to meet their needs. *Third*, private citizens organized as STOs decide which private schools will advance their respective educational goals. This may be all schools and students or a subset defined by a wide variety of limiting school and scholarship principles: geography, special needs, culture, extreme financial need, pedagogical philosophy, shared non-sectarian school characteristics, self-selected school groupings, and, lastly, religious instruction. *Fourth*, each STO must convince each taxpayer each year not only to take advantage of the STO tax credit, but also to contribute to that particular STO.

Like any listener in a public forum, taxpayers are free to choose whether to associate themselves with an

STO and the educational programs it supports or with a public school. Because these tax credits are not "refundable," taxpayers must decide for themselves on a yearly basis (a) whether to make a contribution; (b) whether to claim the credit, take the charitable deduction authorized by 26 U.S.C. § 170, or do nothing at all; and (c) how to allocate the credits to which they are entitled. Arizona is entirely neutral concerning any of these choices and, ultimately, the placement of children and scholarship dollars in religious or non-religious schools.

B. STOs Freely Choose Whether to Adopt Limiting Principles.

As noted above, in addition to convincing taxpayers that private-school education is a worthy cause in the abstract, each STO must convince contributors that it among all other STOs deserves support. Like all private choices, taxpayer support for a particular STO and its professed mission can be fickle. Taxpayers frequently decide from year to year whether they contribute to any STO, as well as which STO or STOs they will support. For example, approximately one fifth of the JTO's contributor pool turns over every year. Many taxpayers may split their contributions between different STOs in a single year, based on how the taxpayer values the choices made by the STO. "[N]othing in Section 1089 precludes any Arizona taxpayer, tomorrow, from suddenly deciding to fund exclusively secular STOs." Garriott Pet. App. 99a n.12 (dissent). In this ongoing struggle for taxpayer support, the state simply plays no role.

As the STO tax credit's primary legislative sponsor explained, the STO tax credit in operation fulfills the secular purpose of "equalizing opportunities for Arizona's children" by providing "an encouragement and incentive for citizens to donate to an organization they believe in."[15] Because citizens believe in different things, STOs do not come in one flavor. The variety of STOs is not the result of government preference, but the fruit of private choice cross-pollinated among families, schools, and communities. STOs are created from time to time by private actors, free of government influence, to further the beliefs, priorities, and interests of a variety of other private actors, including parents, schools, and taxpayers themselves. Indeed, STOs have dramatically expanded in number (before recently contracting a bit): In 1999, the year before this litigation began, there were seventeen STOs in operation; in 2000 there were thirty; and today there are fifty-three. *ADOR 2009 Reporting*, *supra* note 2, at 3. As the dissent below accurately noted, "Anyone can form an STO, and there are no constraints on a taxpayer's ability to donate to an STO of his choice." Garriott Pet. App. 88a. In particular, parents "can create their own STO and solicit donations for use at secular private schools." *Id.* at 104a. The formation of the *amici* STOs illustrates the flexibility of the private sector response.

It is up to the STO itself how to define the students and schools it will directly or indirectly support. An STO's statement of purpose defines the STO. It also

15. Minutes of Mtg., H.R. Comm. on Educ., H.B. 2074, 43rd Leg., 1st Reg. Sess. 1 (Ariz. Jan. 29, 1997) (statement of Rep. Mark Anderson), *reproduced at* JA 227.

defines the messages it will use to persuade taxpayers that that the STO is worthy of the taxpayers' trust. Because Arizona law offers parents of limited means the ability to pool resources and gain access to a true marketplace of educational ideas, any limits on the freedom enjoyed by Arizona STOs to define the principles on which they operate will necessarily limit the choices available to parents, children, *and* taxpayers.

Exercising their freedom of association, some STOs support *all* children and *all* schools. Other STOs distinguish among children based only on whether the families demonstrate the level of financial need that the STO requires. (Petitioner Arizona School Choice Trust is of the latter type.) Many STOs thus support a broad range of schools that includes religious and non-religious institutions.[16]

To the extent that some (but not all) STOs may limit the qualifying schools at which their scholarships may be used, that is in part because many STOs are created by the schools themselves for the benefit of the families who wish to send their children there. As a result, the diversity and size of STOs reflect the diversity and size

16. Such STOs also include the Arizona Scholarship Fund (Arizona's third-largest STO), https://www.azscholarships.org/index.aspx?c=73 (last visited Aug. 3, 2010); the Institute for Better Education (fourth-largest), https://www.ibe scholarships.org/index.aspx?c=80 (last visited Aug. 3, 2010); Tuition Organization for Private Schools (seventh-largest), https://www.topsforkids.com/index.aspx?c=60 (last visited Aug. 3, 2010); and the Arizona Private Education Scholarship Fund, Inc. (eighth-largest), http://apesf.org/supported_schools (last visited Aug. 3, 2010).

of the school communities they support. The JTO, for example, was born in discussions among representatives of three Jewish schools about the need for a common fund that would avoid competition for contributors, and the idea was later supported by a broader community organization, the Jewish Federation of Greater Phoenix. In contrast, New Valley Education Partners, in which New Way participates, reflects the cooperation of three diverse non-religious schools that do not share common signature characteristics other than a commitment to quality education.

Whether they are driven by their specific constituencies or own philosophical beliefs, many or even most STOs have chosen one or more distinctive limiting principles that may be religious or non-religious in nature. These limiting principles reflect private choices about what kinds of children to help, or what kind of schools or education to foster. Expressing them by word and deed is the exercise of core First Amendment freedoms of association and expression:

- **Geography:** An STO may focus geographically, soliciting contributors and supporting private schools in a particular area that may offer only a limited range of schools.[17]

- **Special Needs:** As in New Way's case, an STO, reflecting a school it supports, may focus on grants to children with special educational needs.

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17. Examples include the Pinetop Tuition Support Organization and the School Tuition Association of Yuma, Inc. *See* http://www.azstay.org (last visited Aug. 3, 2010).

- **Culture:** An STO may focus on aiding students on a cultural basis rather than religious grounds.[18]

- **Extreme Need:** An STO may focus on families in the direst financial straits, such as the homeless.[19]

- **Pedagogy:** An STO may support schools that use a particular non-religious pedagogical approach, such as the Montessori method or Waldorf education.[20]

- **Shared School Characteristics:** An STO may support groups of schools based on shared non-religious characteristics, such as membership in a national school organization.[21]

18. For example, Arizona Native Scholastic Enrichment and Resources provides for the educational needs of Arizona Native American youth and their tribes, and its "strategy is to prepare American Indian students for success in college by placing them in private high schools." http://ag.arizona.edu/pubs/general/azlp47-2/other_resources.html (last visited Aug. 3, 2010).

19. The Maricopa County Schoolhouse Foundation provides scholarships for the children of homeless parents and other economically disadvantaged families. *See* http://www.mcschoolhousefoundation.org/pdf/tuitionTaxCreditForm2006.pdf (last visited Aug. 3, 2010).

20. Examples include the Montessori Scholarship Organization and the Arizona Waldorf Scholarship Foundation. *See* http://www.tucsonwaldorf.org/Development_Tax_Credit.html (last visited Aug. 3, 2010).

21. For example, the Arizona Independent Schools Scholarship Foundation supports need-based scholarships to

(Cont'd)

- **School Groupings:** An STO may reflect the coordinated efforts of the self-selected group of schools that created it.[22]

- **Religious Instruction:** Finally, an STO may support schools that offer religious education, whether they reflect a particular movement or denomination or a broad range of beliefs.

Even STOs that offer scholarships to all students for all schools based in part on contributors' recommendations[23] facilitate valuable associational behavior. The tax-credit statute allows extended families, neighborhoods, community organizations, and other groups to pool their contributions to support scholarships for worthy students who would otherwise

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(Cont'd)

three non-religious Arizona schools that are members of the National Association of Independent Schools: Phoenix Country Day School, Green Fields Country Day School, and St. Gregory College Preparatory School. *See* http://www.aissf.org/aboutus.php (last visited Aug. 3, 2010).

22. For example, the Orme-Primavera Schools Foundation provides scholarships to the Primavera School in Prescott and the Orme School in Mayer, both non-religious schools. *See* http://www.ormeprimaveraschoolsfoundation.org/ (last visited Aug. 3, 2010).

23. As a result of 2010 statutory amendments, all STOs must now also "consider the financial need of applicants" and report as to the amount of scholarships awarded to students whose families meet certain economic-eligibility or income criteria. Ariz. Rev. Stat. Ann §§ 43-1503(D)(2), 43-1504(7), *reproduced at* Garriott App. 13, 14.

be kept by financial constraints from using private-school education as a ladder up from poverty.

As the dissent below observed, the majority of STOs—at least twenty-nine out of fifty-three or so—do not limit their scholarships to students willing to attend religious schools. Garriott Pet. App. 91a & n.6. Indeed, five of the ten largest STOs, including the third and fourth largest, have no religious affiliation; these two non-religious STOs alone account for nearly a fifth of total STO donations, and all non-religious STOs account for nearly forty percent of total donations under the STO tax credit. *See ADOR 2009 Reporting*, *supra* note 2, app. I, Garriott App. 30-31; ASCT Br. 35. And at least nine STOs, including New Way Education Partners, support *only* non-religious schools. *See* ACSTO Br. 6 n.5 (citing Garriott App. 30-31).

These limiting principles help motivate private parties to contribute to the STOs. Like taxpayers who claim the charitable deduction, those who claim a credit lose the use of their money from the time of the contribution to their receipt of the tax benefit. In light of this burden, many or even most taxpayers may not be sufficiently moved by the idea of private-school education generally to support an "all-children, all-schools" approach.[24] They are generally more inclined

24. Though the Arizona Legislature amended the STO tax credit in 2010 to allow taxpayers to make eligible contributions until April 15 of the year following the taxable year, 2010 Ariz. Sess. Laws ch. 188 (codified as Ariz. Rev. Stat. Ann. § 43-1089(G)) (effective July 29, 2010), that at best reduces but does not eliminate the float for some taxpayers. Those taxpayers who wish to take a charitable deduction on their *federal* tax return still must make the contribution by December 31.

to give to STOs if they know their money will help children with particular financial or educational needs, or local schools, or their children's or friends' schools, or their own alma mater, or particular educational methods, or religious teaching.

In that second marketplace for fundraising, STOs, armed with their limited principles and particular causes and rallying cries, depend on expressive association. They commonly use a variety of marketing tools, including personal solicitations by volunteers or paid marketers; public speeches; tables at events; newspaper, magazine, theater-screen, and broadcast advertising; telephone banks; and pamphlets, fliers, mass mailings, and e-mail blasts. As with any system that relies on private choice, marketing is not an easy task. It is particularly difficult in times of economic trouble, when the float between contribution and tax benefit proves for many or even most taxpayers to be an insuperable obstacle to contribution, even though the taxpayer's state income tax liability exceeds the maximum contribution and the taxpayer will eventually receive a dollar-for-dollar tax credit. For this reason, many STOs, including *amici*, saw their total contributions drop in 2008 and 2009, and 2009 saw an eight-percent decrease in the total amount of donations from the prior year (from $55 million to $51 million). *See ADOR 2009 Reporting*, *supra* note 2, app. I.

But in every respect and at every level, these are purely private choices, not government policy. The government does not encourage STOs to adopt *any* limiting principles, much less religious ones, and it does not encourage taxpayers to contribute to a particular

kind of STO. In making their philosophical and educational judgments, STOs operate in the same manner as private scholarship organizations that are funded solely by tax-deductible charitable contributions. They certainly exercise no state function or governmental authority, and they cannot be analogized, as the panel did, to the state's delegation of the governmental authority to veto liquor license applications in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). *See* Garriott Pet. App. 39a-40a (opinion), 78a-80a (concurrence).

No reasonable observer would perceive any government favoritism toward a particular choice. As with tax-deductible contributions, the State of Arizona provides the playing field and makes neutral rules, but it then sits on the sidelines and does not root for any team. There is no sense in which, as the panel asserted, "from the perspective of the program's aid recipients, [the tax credit] 'deliberately skew[s] incentives toward religious schools.'" Garriott Pet. App. 22a (opinion) (quoting *Zelman*, 536 U.S. at 650). The dissent below thus accurately noted that "the state's involvement stops with authorizing the creation of STOs and making tax credits available. After that, the government takes its hands off the wheel." *Id.* at 90a. "That is not government endorsement: that is government nonchalance." *Id.* at 95a.

C. Scholarship Funds Flow to Religious Schools Only Because They Follow Parents' Demand.

The Ninth Circuit panel's reliance on how the STO scholarships ultimately are awarded from year to year is both legally erroneous and factually misguided. As a legal matter, this Court has at least twice rejected rules that would evaluate facially neutral laws under the Establishment Clause based on who benefits from time to time, which is necessarily a moving target. *See Zelman*, 536 U.S. at 657; *Mueller*, 463 U.S. at 401.

As a factual matter, money tends to end up in private religious schools because they outnumber private non-religious schools. That is hardly surprising because, as explained above, Arizona has dramatically enhanced the variety of non-religious options available in publicly funded, tuition-free district and charter schools, which enjoy a tremendous cost advantage that the STO tax credit can at best partially offset for private-school options. *See Zelman*, 536 U.S. at 655-56. Parents would naturally tend to send their children to such free schools if the education they seek is available there. They need STO scholarships when they seek in private schools what they cannot find in public schools, which often is religious education but, in the case of *amicus* New Way and other non-religious schools, may be secular benefits. STO funds have followed the students and the schools as a matter of private choice, not government policy. The results of private choices do not provide grounds for invalidating the tax credit under the Establishment Clause.

The panel also argued that "taxpayers, rather than parents, direct funds to religious organizations" and thereby limit parents' choices to send their children to non-sectarian schools, Garriott Pet. App. 67a, 72a (concurrence), but this assertion fails to appreciate the role of parents in determining which STOs receive money in the first place. Parents are critical to starting many STOs, convincing STOs to add schools to approved lists, and directing contributions to STOs that support the schools of their choice. They do this not only by contributing themselves to STOs, but also by convincing family members, friends, neighbors, and co-workers to contribute. They also man the STOs' marketing efforts: working tables at events, passing out fliers, staffing phone banks.

In the end, many STOs give all or sizeable portions of their scholarship funds to students at religious schools because the families *prefer* to send their children to those schools, and help direct taxpayer contributions to STOs that can fund those preferences. And this in itself is again hardly surprising: In Justice Brennan's immortal words, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Parents do not need or want the state's encouragement to choose a religious option. Nor are they the passive victims of others' choices—much less the choices of any state actors—but rather are the engine of choice by the students, the schools, the STOs, and the taxpayers.

III. The Ninth Circuit's Decision Discriminates on the Basis of Expression.

The panel's opinion has "create[d] an inevitable, pervasive, and serious risk of chilling protected speech" and expressive association. *Citizens United*, 130 S. Ct. at 891. Respondents do not object to the existence of STOs "in general." They do not challenge the eligibility of STOs that restrict scholarships to schools and children in specific geographic areas or to those that are organized to advance an identifiable educational method or philosophy. Nor do they object to STOs that support schools focusing on the special needs of certain children, or those that foster any theory of ultimate meaning—as long as it is not "religious." Indeed, as the panel noted, "[a]t oral argument [Respondents] stipulated that they challenge *only* those STOs that restrict scholarships to religious schools." Garriott Pet. App. 8a n.6 (opinion) (emphasis added).

This case thus literally pits taxpayer against taxpayer. Respondents claim standing as Arizona taxpayers who oppose STOs that limit their fundraising and scholarships to students who want to attend religious schools. *Amici* include associations whose conduct and expressions Respondents find objectionable because they raise funds from like-minded taxpayers to allow families to choose a religious option. The government is involved only because it allowed—and now defends—the right to engage in such expressive activities.

First Amendment standards, however, "must give the benefit of any doubt to protecting rather than stifling

speech." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964)). A federal court decree that the *only* STOs forbidden to solicit funds are "those STOs that restrict scholarships to religious schools" would convey a very direct message that religious associations are disfavored in the public square, and that some Arizona taxpayers are "more equal than others." If Respondents prevail, individuals and corporations who wish to direct their contributions only to religious schools will be the *only* Arizona taxpayers who cannot take the tax credit for contributions to the STO of their choice.

Though the *amici* STOs are private actors, Respondents seek use the Establishment Clause to force them to change their focus and their message in order to gain access to a marketplace open to all other STOs. The First Amendment does not require private actors to alter their message to gain access to such fora. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569-70 (1995) ("a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech"); *Rosenberger*, 515 U.S. at 842.

As this Court observed in *Citizens United*, "Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." 130 S. Ct. at 899. As the Court noted, "[t]he

First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* Thus, the Ninth Circuit panel had no business giving new life to an attempt to allow only STOs that give "neutral" messages, rather than religious ones, by allowing a range of scholarship-eligible institutions that Respondents find acceptable, even if they are not schools the STOs in fact wish to help children attend. "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id.* Rather, "the public" is entitled to "the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id.*; *see also Ark. Educ. Television v. Forbes*, 523 U.S. 666, 677 (1998) ("If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny" (citations omitted)).

The very genius of Arizona's STO tax credit is that the government plays no role in regulating the viewpoints of these private organizations, as reflected in their choices of the kind of schools for which they will provide scholarships. The variety of limiting principles adopted by STOs reflects what Tocqueville described as Americans' "extreme skill" in "the science of association," which allows citizens, by combining together, to achieve common objectives beyond the reach of individuals without resort to "the governing power."[25] "If it is proposed to inculcate some truth or

25. 2 Alexis de Tocqueville, *Democracy in America*, 2d bk., ch. V, at 114-15, 116, 118 (Phillips Bradley ed. 1945).

foster some feeling by the encouragement of a great example, they form a society."[26] As Tocqueville observed, Americans have "associations of a thousand ... kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive," and, among other things, "in this manner they found . . . schools."[27]

The First Amendment protects such associational freedom—particularly in the intellectual, expressive realm of education—and it would be the irony of ironies to allow the First Amendment to be used to undermine the legislative and executive branches' endorsement of private choice and to deprive citizens, including taxpayers and those who form and run STOs, of their ability to select religious objectives for their private action.

26. *Id.* at 114.

27. *Id.*

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 0 6 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

In the Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Arizona has wisely designed its STO contribution credit to accommodate parental and religious rights. It steers clear of Establishment Clause traps by allowing taxpayers to voluntarily channel their own "tax dollars" to desired destinations. This multi-tiered layering of private choices takes the constitutionally mandated "hands off" approach necessary to ensure

[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

the absence of state action—a prerequisite for any constitutional violation.

ARGUMENT

I. IN THE ABSENCE OF STATE ACTION, THE ANALYSIS SHOULD END UPON FINDING A VALID SECULAR PURPOSE.

State action is the launching pad for constitutional violations. Constitutional rights are protected against *state* interference—not the conduct of private parties—with rare exceptions such as the Thirteenth Amendment right to be free from involuntary servitude. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993).

Arizona's program involves a series of uncoordinated decisions by literally thousands of private parties. These do not add up to the singular *state* action required to allege a constitutional violation:

> [I]f *numerous private choices*, rather than the *single choice of a government*, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.
>
> *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (emphasis added) ("*Mitchell*")

It is easier to identify state action in the context of affirmative rights—free exercise, speech, association. Plaintiffs base their standing on taxpayer status,

asserting the state has violated their right not to support religion through their taxes. But even if tax credits are economically equivalent to a subsidy, funds are wholly directed by *private* actors—not *state* actors.

Reliance on *Lemon v. Kurtman*, 403 U.S. 602 (1973) has resulted in judicial treatment of the Establishment Clause that is inconsistent with other constitutional provisions. "More explicit and concerted applications of the state action doctrine to the Establishment Clause will help ameliorate this incoherence." *Developments in the Law: State Action and the Public/Private Distinction: The State Action Doctrine and the Establishment Clause*, 123 Harv. L. Rev. 1278, 1280 (2010) ("*Developments*"). In religion cases, the state action doctrine would help courts draw "the crucial dividing line" between *protected* private conduct and *prohibited* government action—"the public/private distinction that is enshrined in the Constitution's two Religion Clauses." *Id.* at 1284, 1290.

This critical dividing line is particularly important in Arizona, a state that "forged a clear path toward separation by prohibiting state aid to sectarian education." *Kotterman v. Killian*, 193 Ariz. 273, 300, 972 P.2d 606 (1999) (Feldman, J., dissenting) ("*Kotterman*"). *State* support is prohibited—not *private* conduct.

There is no state action in the implementation of Arizona's tax credit—and the Ninth Circuit cannot magically "manufacture what does not exist." *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 670 (9th Cir. 2009) (O'Scannlain, J., dissenting). Without

a threshold finding of state action, there is no Establishment Clause issue to adjudicate.

A. Case Law Reveals Many Valid Secular Purposes—And Virtually No Probability That Improper Sectarian Motives Influenced The Challenged Legislation.

There are many reasons for the state to aid all of its students, including those in private schools. The state action doctrine does not alter the need to address *Lemon's* purpose prong, which "goes to the substance of the Establishment Clause." *Developments, supra*, 123 Harv. L. Rev. at 1282. Courts "continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Agostini v. Felton*, 521 U.S. 203, 222-223 (1997) ("*Agostini*").

Cases rarely fail this inquiry. This Court is "reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983) ("*Mueller*"). Evaluating tax benefits in *Mueller*, this Court shifted focus from *Lemon's* "effect" prong to the secular purpose, sustaining a well-educated citizenry. Boyer, Jonathan D., *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 Colum. J.L. & Soc. Probs. 117, 126 (2009) ("*Education Tax Credits*").

Cases upholding school aid have found numerous secular purposes: *Board of Education v. Allen*, 392 U.S. 236, 247 (1968) ("raising national levels of knowledge, competence, and experience"); *Hunt v.*

McNair, 413 U.S. 734, 741 (1973) (facilities and structures to give youth the "fullest opportunity to learn and to develop their intellectual and mental capacities"); *Mueller, supra*, 463 U.S. at 395 ("[a]n educated populace is essential to the political and economic health of any community"); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 485 (1986) ("*Witters*") (vocational rehabilitation); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 (1993) ("*Zobrest*") (sign language interpreter); *Agostini, supra*, 521 U.S. 203 (remedial services to low-income students); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) ("*Zelman*") ("providing educational assistance to poor children in a demonstrably failing public school system").

"The encouragement of private schools, in itself, is not unconstitutional." *Kotterman, supra*, 193 Ariz. at 278. Tax benefits are "legitimate tools" in that endeavor. *Id.* at 279. Even cases striking down school aid have jumped the secular purpose hurdle: *Wolman v. Walter*, 433 U.S. 229, 236 (1977) ("*Wolman*") (protecting the health of schoolchildren and "providing a fertile educational environment"); *id.* at 262 (Powell, J., concurring in part) (relieving tax burdens, stimulating public schools through healthy competition, facilitating high quality education); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) ("*Nyquist*") (safe, healthy educational environment; pluralism and diversity); *id.* at 796 (educational choices for low-income families); *Meek v. Pittinger*, 421 U.S. 349 (1975) ("*Meek*") (supplemental auxiliary services); *Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985) (providing for the education of children is a "praiseworthy goal"); *Aguilar v. Felton*, 473 U.S. 402 (1985) (programs for

educationally deprived children from low-income families).

A program is "doomed from the start" if the state allocates benefits *because of*, rather than *in spite of*, a recipient's religious character. *Mitchell, supra*, 530 U.S. at 809-810. This Court struck down a state sales-tax exemption granted *solely* to religious periodicals. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989). That case is poles apart from the Arizona program, where results depend on the convergence of many uncoordinated private decisions--not *state* action. Under these circumstances, this Court has overwhelmingly rejected the relevance of statistics for evaluating constitutionality. *Mueller, supra*, 463 U.S. at 401; *Witters, supra*, 474 U.S. at 491 n. 3 (Powell, J., concurring); *Agostini, supra*, 521 U.S. at 229; *Mitchell, supra*, 530 U.S. at 801, 812 n. 6, 826; *Zelman, supra*, 536 U.S. at 650, 652, 655. Following suit, Arizona "refuse[d] to hinge constitutional scrutiny on such ephemeral numbers" when evaluating the tax credit scrutinized in this case. *Kotterman, supra*, 193 Ariz. at 282.

Framers of the Arizona Constitution took education seriously, believing that "educated citizens are vital to a free and united society." *Id.* at 290. When legislators created the charter school program in 1994, they "hoped to encourage the development of educational settings that would invigorate learning, improve academic achievement, and provide additional choices for parents and children. See A.R.S. § 15-181(A)." *Id.* The tax credit furthers similar goals. *Id. See also Green v. Garriott*, 221 Ariz. 404, 409, 212 P.3d 96 (2009) (business tax credit facilitates high quality education).

Plaintiffs face monumental evidentiary difficulties in challenging Arizona's facially valid statute. The state does not control the formation, management, or policies of the STOs. The state does not control the decisions of taxpayers who contribute to them. Even concurring Ninth Circuit judges admit that "[i]ndividuals' contributions to STOs that discriminate on the basis of religion are not, of themselves, probative of Section 1089's purpose." *Winn v. ACSTO, supra*, 586 F.3d at 658 (Nelson, Reinhardt and Fisher, J., concurring).

The Ninth Circuit cites two other circuits that "have considered private conduct... probative of [a state] program's purpose, and *Winn* does not foreclose the possibility that plaintiffs can point to private conduct probative of whether Section 1089 has a secular purpose." *Id.* at 657-658. These cases are not on point. Community response helped the Fifth Circuit find a secular purpose for a state-sponsored monument—portraying a citizen carrying a Bible—which had stood for 32 years without objection. *Staley v. Harris County, Tex.*, 461 F.3d 504, 513 (5th Cir. 2006). While helpful in assessing the appearance of endorsement, this barely touches the *state's* original intent. The D.C. Circuit dismissed a case objecting to the closing of a public library on Easter Sunday, finding it proper to consider the "testimony of parties who participated in the enactment or implementation" of the law. *Bonham v. D.C. Library Admin.*, 989 F.2d 1242, 1244-45, 300 U.S. App. D.C. 370 (D.C. Cir. 1993). These "private" parties were acting in official capacities, unlike Arizona's taxpayers.

Even if some Arizona legislators secretly hoped to assist religious schools, the probability of achieving

that purpose is remote. The state has taken the "constitutionally required hands-off approach," allowing "external factors [to] define the playing field." *Winn v. ACSTO, supra*, 586 F.3d at 665 (O'Scannlain, dissenting). Whatever the purpose—secular or religious—taxpayers could easily thwart it. *Id.* at 668.

B. Arizona Has Not Delegated An Exclusively *Public* Function To Private Actors

Private citizens have substantial rights and responsibilities in the education of children. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Unlike *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (zoning) or *Bd. of Educ. of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994) (public school district) ("*Kiryas Joel Village*")—in the present case education is not an exclusively state function, nor has Arizona improperly delegated it.

In *Larkin*, the state abdicated its traditional zoning authority and granted absolute veto power to individual churches. *Larkin v. Grendel's Den, supra*, 459 U.S. at 125. "[S]tate cooperation with churches is a far cry from state cooperation with taxpayers." *Winn v. ACSTO, supra*, 586 F.3d at 668 (O'Scannlain, dissenting). *Larkin* created a prohibited "fusion of governmental and religious functions." *Larkin v. Grendel's Den, supra*, 459 U.S. at 126-127, citing *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). Even the Ninth Circuit acknowledged that *Larkin* does not control this case because "the delegation of scholarship funding to individual taxpayers...does less to promote religion than the delegation of zoning authority to churches." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1020

(9th Cir. 2009). No individual taxpayer has more than a nominal impact on education--unlike *Larkin*, where a single church could usurp the government's zoning authority.

In *Kiryas Joel Village*, the state purposely vested power in religious individuals when it carved out a unique school district to accommodate a Jewish sect. Religious identity was the basis for their civic authority. *Kiryas Joel Village, supra*, 512 U.S. at 699. A court injunction, based on the now-overruled *Aguilar* case, precluded them from receiving assistance for their disabled children. *Id.* at 692-693; Bassett, William W., *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 BYU L. Rev. 243, 264 (2008) ("*Changing Perceptions*"). These individuals were not *private* taxpayers making *private* choices, but *public* officials supervising a *public* school district. Moreover, the efforts of these religious officials were coordinated—unlike the combined effect of Arizona taxpayers who support STOs with no plan or organization.

Education existed in America long before the instigation of public schools. The Ninth Circuit argues that educational policy is "certainly a traditional government function." *Winn v. ACSTO, supra*, 586 F.3d at 656 n. 8 (Nelson, Reinhardt and Fisher, J., concurring). This broad statement overlooks the context in *Kiryas Joel Village*: "Authority over public schools belongs to the State." *Kiryas Joel Village, supra*, 512 U.S. at 698. The special school district subjected all families in the district to a religiously controlled *public* school system. Arizona families have a broad spectrum of choices and no coercion is

anywhere on the horizon. The uncoordinated choices of taxpayers are hardly tantamount to the exercise of government authority over *public* education.

C. Tax Benefits Are Not Equivalent To An Outright Subsidy. The Government's Role Ends With The Granting Of Tax Relief.

It is difficult to contend that state action extends after the government's role has ended. Arizona's role ended with the enactment of tax benefits. Having crossed that crucial dividing line, state action vanishes.

Arizona's credit involves no "direct transfer of public monies to the subsidized enterprise...us[ing] resources exacted from taxpayers as a whole." *Nyquist, supra*, 413 U.S. at 807 (Rehnquist, J., dissenting). Beyond creating the tax program, there is no "genuine nexus" or state action. Even the *Zobrest* dissent acknowledged this point—distinguishing *Witters* and *Mueller* because "[t]hose cases dealt with the payment of cash or a tax deduction, where governmental involvement ended with the disbursement of funds or lessening of tax." *Zobrest, supra*, 509 U.S. at 22 (Blackmun, J., dissenting) (*Zobrest* upheld IDEA aid to a deaf high school student in a Catholic school).

"Private choice" cases also resonate with the state action doctrine. In *Mueller*, *Witters*, and *Zobrest* "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman, supra*, 536 U.S. at

652. In Arizona, similarly, "the state's involvement stops with authorizing the creation of STOs and making tax credits available. After that, the government takes its hands off the wheel." *Winn v. ACSTO*, *supra*, 586 F.3d at 659 (O'Scannlain, dissenting).

Arizona's tax credit is analytically similar to a tax exemption:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.
>
> *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970) ("*Walz*")

D. None Of The Private Decision Makers—Taxpayers, STOs, Or Parents—Are "State Actors." There Is No Concerted Action Or Close Nexus Sufficient To Attribute Their Conduct To The State.

The Ninth Circuit implicitly concedes that STOs are not state actors. *Winn v. ACSTO*, *supra*, 562 F.3d at 1013 n. 10 ("Plaintiffs do not argue that STOs are state actors, so we do not decide whether the STOs' conduct, in itself, could support an Establishment

Clause claim"). Parents are not state actors and neither are the taxpayers who merely direct a few of their own tax dollars.

"[T]he acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 n. 6 (1982). Nothing suggests that taxpayers, STOs, parents, or schools have acted "in concert" with Arizona to advance religion. Instead, there is a disconnected series of private actions with unpredictable results.

The level of funding flowing to religious schools does not create state action since there is no "direct connection" between the funding procedure and the religious activities of the schools. "[Q]uestioned behavior always requires a *nexus* with the state for it to be considered unconstitutional." *Developments*, *supra*, 123 Harv. L. Rev. at 1284. State funding does not transform private conduct into state action "where there is little direct connection between that funding and the prohibited activity." *Id.* at 1290. In *Rendell-Baker*, this Court found an absence of state action where a private school—which received 99% of its funding from the government—terminated a teacher who disagreed with the director. *Rendell-Baker v. Kohn*, *supra*, 457 U.S. at 836-837. The employee could not allege a free speech violation. No matter how much funding flows to religious entities, Arizona's taxpayer directed mechanism does not convert either STOs or schools into state actors.

Admittedly, "an STO could pool several contributions and then pay the full tuition for any student, group of students, or...all students in any

group of schools of a single religious faith." *Kotterman, supra*, 193 Ariz. at 297 (Feldman, J., dissenting). Some STOs restrict scholarships on the basis of religion—as *private* actors are constitutionally entitled to do. Some taxpayers support religious STOs. Neither possibility transgresses *Agostini*'s requirement that a court consider whether an aid program "defines its recipients by reference to religion." *Mitchell, supra*, 530 U.S. at 813. There is no constitutional violation where *private* actors make such distinctions.

E. The *Government Itself* Does Not Advance, Promote, Or Endorse Religion.

"For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987). This restates the prerequisite for a constitutional violation:

> This case is...notable...for what it does not involve: state action advancing religion. The government does not direct any aid to any religious school. Nor does the government encourage, promote, or otherwise incentivize private actors to direct aid to religious schools.
>
> *Winn v. ACSTO, supra*, 586 F.3d at 658-659 (O'Scannlain, dissenting)

Arizona has not advanced religion by enacting legislation that sets in motion a series of disconnected private choices. The process is analogous to proximate causation (tort law). The state is the "actual cause" of

private school benefits, which would not exist apart from the statute, but there are too many broken links in the chain for Arizona to be the "proximate cause" of the aid. Private parties—taxpayers, STOs, parents—are the "superseding intervening independent causes" that rupture the connection. "[T]he *government itself* is at least four times removed from any aid to religious organizations." *Winn v. ACSTO*, *supra*, 586 F.3d at 662 (O'Scannlain, dissenting). The program "could just as easily have resulted in a total dearth of funding for religious organizations...." *Id.*

Arizona does not directly appropriate funds to a religious entity. But the Ninth Circuit, oblivious to the elaborate funding route, highlights the lack of absolute parental choice "to suggest that by filtering aid through multiple levels of private choice—rather than a single level—the state endorses religion. But that makes no sense. How can *increasing* the separation between state and religion result in heightened government endorsement?" *Id.* at 662 n. 10. *Taxpayer* choices may limit the options available to parents, but "the question is whether the *government* has somehow limited or constrained [parental] choice[s]"—and taxpayers are not state actors. *Id.* at 663.

In *Agostini*, this Court began to focus on whether religious indoctrination "could reasonably be attributed to governmental action." *Agostini*, *supra*, 521 U.S. at 226, quoting *Zobrest*, *supra*, 509 U.S. at 10. "[T]he answer to the question of indoctrination will resolve the question whether a program of educational aid 'subsidizes' religion, as our religion cases use that term. [citations omitted]." *Mitchell*, *supra*, 530 U.S. at 809. The issue of governmental indoctrination is

ultimately a question of state action. *Developments, supra*, 123 Harv. L. Rev. at 1281.

Finally, it is difficult to believe that several layers of private choice could possibly be perceived as *state* action improperly endorsing religion:

> [U]nder the endorsement test, any level of attenuation between government action and aid to religion necessarily reduces the likelihood that a "reasonable observer" will find impermissible government approbation.
>
> *Winn v. ACSTO*, *supra*, 586 F.3d at 667 (O'Scannlain, dissenting)

Only the most irrational or biased observer could possibly believe the *state* has surreptitiously engineered a program to advance religion within the parameters of Arizona's multi tiered scheme.

"[E]ndorsement of [a] religious message is reasonably attributed to the individuals who select the path of the aid." *Mitchell, supra*, 530 U.S. at 842-843 (O'Connor, J., concurring). Where direct state aid is used for religious indoctrination, it is logical to perceive endorsement of the message, but not where private choices select the route. *Mueller, supra*, 463 U.S. at 399; *Zelman, supra*, 536 U.S. at 654-655. In *Witters*, this Court held there was no state action where a private citizen used neutrally available aid for a religious education. *Witters, supra*, 474 U.S. at 488-489. The situation is analogous to a state-created speech forum that does not "confer any imprimatur of state approval." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), quoted in *Mueller, supra*, 463 U.S. at 397.

F. The State Action Doctrine Is Consistent With This Court's Shift To A More Flexible Approach Based On Nondiscrimination And Private Choice.

This Court has struggled to apply the Establishment Clause to school aid cases. *Mitchell, supra*, 530 U.S. at 807. But only a thin thread connects Arizona to the attenuated benefits flowing to private schools. This Court offered a helpful analogy in *Witters* when it began to abandon the strict "no aid" principle:

> It is well settled that the *Establishment Clause* is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.
>
> *Witters, supra*, 474 U.S. at 486-487; cited in *Agostini, supra*, 521 U.S. at 225-226 and *Mitchell, supra*, 530 U.S. at 816, 841

The tax credit's economic effect is comparable to direct aid, but the constitutional analysis is radically different. Direct aid is *state* action. Private choice programs are not. *Nyquist* acknowledged the relevance of the funding route but considered it only one of many factors. *Nyquist, supra*, 413 U.S. at 781. *Mueller* elevated the importance of this factor. *Education Tax Credits, supra*, 43 Colum. J.L. & Soc.

Probs. at 126; *Mueller, supra*, 463 U.S. at 399. There is no state action where private actors channel the flow of funds, and while "private choice is easier to see when aid literally passes through the hands of individuals...there is no reason why the Establishment Clause requires such a form." *Mitchell, supra*, 530 U.S. at 816.

Various forms of state action emerge in school aid cases. Recently, this Court has upheld some aid *in spite of state action* where benefits are offered on a nondiscriminatory basis without regard to religion. But no case has struck down aid where—as here—there is no state action beyond the enactment of a facially neutral program.

The direct monetary aid in *Lemon* and *Nyquist* is the most obvious instance of state action. The services of *public* employees were implicated in four cases this Court subsequently overruled: *Meek, supra*, 421 U.S. 349 (auxiliary services), *Wolman, supra*, 433 U.S. 229 (diagnostic, therapeutic, and remedial services); *Aguilar v. Felton, supra*, 473 U.S. 402 (services for educationally deprived children), *Sch. Dist. v. Ball, supra*, 473 U.S. 373 (teachers in private school classrooms "leased" to the state). These services are readily traced to the state, but later cases allowed such aid if it resulted from private choices: *Zobrest, supra*, 509 U.S. at 10 (sign language interpreter in Catholic school not attributable to state decision); *Agostini, supra*, 521 U.S. 203 (remedial education for low-income students). *Agostini* abandoned the *Meek Ball* presumption that placing public employees on private school premises will inevitably create state-sponsored indoctrination or a symbolic union between the state and religion. *Id.* at 223.

In some cases, state-owned equipment, books, and/or materials were loaned to private schools or their students: *Meek, supra*, 421 U.S. 349; *Wolman, supra*, 433 U.S. 229; *Mitchell, supra*, 530 U.S. 793. In *Meek*, the Court upheld loans of textbooks acceptable for public school use but struck down loans of items that might be diverted to teach religion or free up money for religious instruction. *Meek, supra*, 421 U.S. at 395. In *Wolman*, this Court upheld a secular textbook loan program similar to *Meek*. *Wolman, supra*, 433 U.S. at 237-238. *Mitchell* overruled portions of both of these cases and upheld loans of federally funded equipment "offered to a broad range of groups or persons without regard to their religion." *Mitchell, supra*, 530 U.S. at 809. As with public employees, the judicial tide turned and carefully crafted aid survived in spite of state action.

Minimal state action characterizes private choice cases—*Mueller*, *Witters*, *Zobrest*, *Mitchell*, and *Zelman*. *Zelman* implicitly acknowledges the state action doctrine: "While our jurisprudence with respect to the constitutionality of direct aid programs has 'changed significantly' over the past two decades...our jurisprudence with respect to true private choice programs has remained consistent and unbroken." *Zelman, supra*, 536 U.S at 649. *Mueller*, *Witters*, and *Zobrest* are examples of that consistency—all three times rejecting Establishment Clause challenges because aid reached religious entities solely by the direction of private individuals—not the state. Justice O'Connor affirms this point in *Mitchell*, observing that the advancement of religion is "*wholly* dependent on the student's private decision." *Mitchell, supra*, 530 U.S. at 842 (O'Connor, concurring).

Arizona's program does not involve direct aid, public employees, or loans of state-owned assets. All aid is mediated through the tax code and must be initiated through private action. *Arizona* has not "created an overwhelming disparity in the number of scholarships exclusively available for use at religious schools" merely by allowing tax credits to STOs that "discriminate" by limiting funds to such schools. *Winn v. ACSTO, supra*, 586 F.3d at 653 (Nelson, Reinhardt and Fisher, J., concurring). Thousands of private decisions combined to create that disparity—which could flip in the future. "[T]he fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief." *Mueller, supra*, 463 U.S. at 401. Similarly, the conduct of *private* Arizona citizens is constitutionally irrelevant. Reliance on wavering numbers brings neither certainty nor principled standards to this Court's Establishment Clause jurisprudence. *Id.* Application of the state action doctrine is consistent with recent trends in this Court's school aid jurisprudence and leads naturally to the conclusion that Arizona's tax credits are constitutional because there is no state action at any critical juncture in the funding route.

II. ARIZONA'S STATUTORY SCHEME IS UNIQUELY CRAFTED TO UPHOLD THE CONSTITUTION

Arizona offers families a statutory smorgasbord of educational options, in keeping with the trend of many states to "explor[e] alternatives to traditional public education from charter schools to private school

vouchers." *Kotterman, supra*, 193 Ariz. at 290. In addition to the tax credit challenged in this litigation (A.R.S. § 43-1089), the entrees on that "smorgasbord" include tuition-free public schools (A.R.S. § 15.816.01(A)), charter schools (A.R.S. § 15-181), home schooling (A.R.S. § 15.802), corporate tax credits (A.R.S. § 43-1183), and a credit for public school extracurricular activity fees (A.R.S. § 43-1089.01).

Arizona's tax credit scheme is carefully designed to promote constitutional values. Unlike past credits that facilitated racial segregation in defiance of the Constitution, Arizona accommodates the free exercise of religion and parental rights to direct the upbringing of their children. Moreover, the role permitted to taxpayers furthers the Establishment Clause goal of protecting against coerced financial support of religion.

A. Allowing *Taxpayers* To Initiate The Flow Of Funds Ensures That No Citizen's "Tax Dollars" Are Forcibly Diverted To Support Religion.

The Ninth Circuit is fixated on the point that *taxpayers*—not *parents*—choose to aim funds toward religious destinations. But "[p]arental choice cannot help the *taxpayer* who does not want to finance the religious education of children." *Zelman, supra*, 536 U.S. at 728 (Breyer, J., dissenting). Arizona confronts this objection—the only "tax dollars" flowing to religious STOs or schools are directed there by particular taxpayers. Plaintiffs base standing on taxpayer status, but not one penny of *their* tax dollars supports religious education.

All taxpayers are compelled to support education. Arizona's ingenious multi-tiered scheme allows them to channel some of their own educational "tax dollars." The program insulates the state against charges of financing religion and facilitates compliance with a primary Establishment Clause purpose:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions....
>
> *Everson v. Board of Education*, 330 U.S. 1, 16 (1947)

Legislature history confirms this point:

> Mr. Franks stated that he believes all citizens do presently contribute dramatically to the public school system. This legislation represents an option to redirect some of the money that would go to the general fund to a charity fund.
>
> Minutes of the Committee on Education, Arizona S., 43rd Leg., 1st Reg. Sess. (March 20, 1997); *see* Joint Appendix, p. 231.

"One of the strengths of the scholarship tax credit is that it puts power in the hands of individuals to allocate resources instead of giving all control to the state." Goldwater Report, December 11, 2003, The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students; *see* Joint Appendix, p. 67.

School aid has repeatedly sparked legal challenges. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) appears to have "launch[ed] a nationwide campaign to purge the religious schools of every penny of public money and the public schools of every vestige of religious sentiment." *Changing Perceptions*, *supra*, 2008 BYU L. Rev. at 258.

Nevertheless, federal and state tax codes direct a broad array of benefits to religious institutions. The $8.2 million implicated in *Zelman's* school voucher program "pale[d] in comparison to the amount of funds that federal, state, and local governments already provide[d] religious institutions"—income and property tax exemptions, charitable deductions, and programs like the "Hope Tax Credit." *Zelman*, *supra*, 536 U.S. at 665 (O'Connor, J., concurring).

Tax exemptions and government subsidies are not the same, despite economic similarity. Unlike an exemption, where government passively refrains from assessing a tax, a subsidy "'forcibly diverts the income of both believers and nonbelievers ...' Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, pt. II, 81 Harv. L. Rev. 513, 553 (1968)." *Walz*, *supra*, 397 U.S. at 690-691 (Brennan, J., concurring). Arizona's credit is more like an exemption. It hinges on voluntary participation, not funds extracted from taxpayers in general. The *Kotterman* dissent erroneously objected that "[i]t is a dangerous doctrine that permits the state to divert money otherwise due the state treasury and apply it to uses forbidden by the state's constitution." *Kotterman*, *supra*, 193 Ariz. at 307 (Feldman, J., dissenting). The *state* has neither diverted a penny nor "somehow imposed a tax by declining to collect potential revenue

from its citizens." *Id.* at 288. Otherwise, courts "would also be forced to rule that deductions for charitable contributions to private schools [are] unconstitutional because they too, would amount to the laying of a tax." *Id.*

Granting taxpayers choices guarantees that no one is compelled to support religion. The state does not levy a tax or appropriate funds for religious education. Taxpayers direct *their own tax dollars* to STOs they support. Religious STOs bolster Establishment Clause compliance by ensuring that only voluntarily directed "tax dollars" reach religious schools.

B. Arizona's Program Of "Benevolent Neutrality" Accommodates And Facilitates Fundamental Rights

"[T]he tuition tax credit is a neutral adjustment mechanism for equalizing tax burdens and encouraging educational expenditures." *Kotterman, supra*, 193 Ariz. at 292. This program reflects the "benevolent neutrality" that "permit[s] religious exercise to exist without sponsorship [or] interference." *Walz, supra*, 397 U.S. at 669. Arizona encourages religious instruction without coercing financial support, thus "follow[ing] the best of our traditions ..respect[ing] the religious nature of our people and accommodat[ing] the public service to their spiritual needs." *Zorach v. Clauson*, 43 U.S. 306, 313 (1952). It would be "most bizarre" for this Court to "reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." *Mitchell, supra*, 530 U.S. at 827-828. The

same is true here. Arizona offers both secular and religious options. The *Kotterman* dissent objected that "the statute does not prevent an STO from directing all of its grant money to a group of schools that restrict enrollment or education to a particular religion or sect." *Kotterman, supra*, 193 Ariz. at 293 (Feldman, J., dissenting). That flexibility permissibly accommodates the religious freedom of taxpayers, STOs, and parents.

1. Arizona's Tax Credit Facilitates The *Exercise* Of Constitutional Rights, Unlike Past Programs That Promoted The *Denial* Of Equal Protection

"[W]here the state law is genuinely directed *at enhancing a recognized freedom of individuals*, even one involving both secular and religious consequences, such as the right of parents to send their children to private school, the Establishment Clause no longer has a prohibitive effect." *Nyquist, supra*, 413 U.S. at 802 (Burger, C.J., dissenting) (emphasis added).

Arizona's tax credits facilitate the *exercise* of parental and religious rights—rather than the *denial* of rights—equal protection and freedom from discrimination. Decades ago, "[t]he prospect of subsidized private schools threatened to aggravate the difficulties of desegregation by expanding the avenues for white flight." Laycock, Douglas, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. Rev. 275, 285 (2008) ("*Why the Supreme Court Changed Its Mind*"). This Court rightly struck down schemes to deny equal protection by diverting public funds to racially discriminatory private schools.

> The injunction against paying tuition grants and giving tax credits while public schools remain closed is appropriate and necessary since those grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia.
>
> *Griffin v. County Sch. Bd.*, 377 U.S. 218, 233 (1964)

In *Griffin*, tax credits enabled *denial* of rights to public education and equal protection. In Arizona, tax credits enable the *exercise* of rights—religion and parenting—without trampling the rights of others.

This Court also enjoined enforcement of a Mississippi textbook lending program that assisted discriminatory private schools.

> Racial discrimination in state-operated schools is barred by the Constitution and "it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee v. Macon County Bd. of Ed.*, 267 F.Supp. 458, 475-476 (M.D. Ala. 1967)
>
> *Norwood v. Harrison*, 413 U.S. 455, 463-465 (1973)

Although the *government itself* may not advance religion, it also must not inhibit religion. Accommodation may be mandatory to lift a

government-imposed burden—or permissible. Arizona's permissible accommodation stands in stark contrast to the *Griffin* and *Norwood* programs that stifled rights.

2. Arizona Accommodates Religion And Parental Rights.

Education is compulsory for Arizona children. A.R.S. § 15-802(A). But parents may fulfill that obligation through private school placement. *Pierce v. Society of the Sisters, supra*, 268 U.S. at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). Many families cannot afford the tuition for an education compatible with their beliefs. Arizona's program is a permissible accommodation that opens doors for such families.

Ever since the initiation of public schooling and compulsory education laws, it has been desirable to facilitate choices. *Education Tax Credits, supra*, 43 Colum. J.L. & Soc. Probs. at 119. The *Nyquist* majority and *Everson* dissent both expressed sympathy for the double burden borne by parents who place children in private schools while supporting public schools with their taxes. *Nyquist, supra*, 413 U.S. at 788-789; *Everson v. Bd. of Educ., supra*, 330 U.S. at 18 (Jackson, J., dissenting). "[I]t is no more than simple equity to grant partial relief to parents who support the public schools they do not use." *Nyquist, supra*, 413 U.S. at 803 (Burger, J., dissenting).

Tax benefits provide a "rough return for the benefits...provided to the State" when parents bear the

financial burden of private education on top of their taxes. *Mueller, supra*, 463 U.S. at 402. Similarly, "Arizona's tax credit achieves a higher degree of parity by making private schools more accessible and providing alternatives to public education." *Kotterman, supra*, 193 Ariz. at 282. Far from offering a financial incentive to enroll in religious schools, Arizona merely "effectuat[es] the secular purpose of the equalization of the cost of educating [Arizona] children that are borne by parents who send their children to nonpublic schools." *Nyquist, supra*, 413 U.S. at 812 (Rehnquist, J., dissenting). Moreover, "[t]he program does not force any individual to submit to religious indoctrination or education." *Zelman, supra*, 536 U.S. at 680 (Thomas, J., concurring).

Parents have religious freedom rights. Many are dissatisfied with public schools. Religion has been systematically expelled. *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer), *Abington Township Sch. Dist. v. Schempp, supra*, 374 U.S. 203 (Bible reading); *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation prayers); *Santa Fe. Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student-led prayer at athletic events). When mandatory school curriculum clashes with faith, parents have little recourse—either subject their children to objectionable material or get out of the public schools. *Epperson v. Arkansas*, 393 U.S. 97 (1968) (evolution); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (same). Evangelical parents face the same dilemma as their Catholic counterparts years ago, "paying taxes for public schools they [cannot] use in good conscience, and also paying tuition to fund religiously acceptable private schools." *Why the*

Supreme Court Changed Its Mind, *supra*, 2008 BYU L. Rev. at 289.

There is a grave need for accommodation. *Meek* illustrates the unjust burden on religious liberty when a parent is forced "to choose between the 'free exercise' of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps, through remedial assistance financed by his taxes." *Meek*, *supra*, 421 U.S. at 387 (White, J., dissenting).

The state is obligated to educate its children and compels school attendance. Thus "it should be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools." *Id.* at 394-395 (Rehnquist, J., dissenting). Arizona is not supporting *churches*, but *education* in a religious atmosphere. This aligns with *Zelman's essence*, "that the religious schools in Cleveland were not 'pervasively sectarian,' nor centers of 'indoctrination,' but were genuine institutions of education." *Changing Perceptions*, *supra*, 2008 BYU L. Rev. at 270.

C. For Establishment Clause Purposes—Unlike Free Speech And Other Constitutional Rights—Tax Benefits Are Treated As Qualitatively Different From Direct Subsidies.

The Establishment Clause occupies a unique place in the Constitution. It limits government but also complements the Free Exercise Clause, guarding religious liberty. Taken to extremes and wrenched from its context, the clause morphs into a sword

attacking religious freedom instead of a shield protecting it:

> [S]chool choice programs that involve religious schools appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause. Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disserves those in the greatest need.
>
> *Zelman, supra*, 536 U.S. at 683-684 (Thomas, J., concurring)

Tax benefits and direct subsidies are qualitatively different in the Establishment Clause context, despite economic equivalence. The state actively subsidizes an enterprise when it transfers funds collected from taxpayers as a whole, but government is passively involved in tax relief. Tax credits, deductions, vouchers, and STO contribution credits "differ in terms of the source and path of funds, as well as the financial gain ultimately accruing to the beneficiary." *Education Tax Credits, supra*, 43 Colum. J.L. & Soc. Probs. at 141.

The Ninth Circuit presumes that Arizona's credit is tantamount to a direct subsidy. *Winn v. ACSTO, supra*, 562 F.3d at 1009 ("The Supreme Court has recognized...that state tax policies such as tax deductions, tax exemptions and tax credits are means of 'channeling...[state] assistance' to private organizations, which can have 'an economic effect comparable to that of aid given directly' to the

organization. *Mueller, supra*, 463 U.S. at 399.") But *Mueller* upheld Minnesota's tax deductions, recalling the historic Establishment Clause purpose in "preventing that kind and degree of government involvement in religious life that...is apt to lead to strife and frequently strain a political system to the breaking point. [citations omitted]." *Id.* at 399-400. We are far removed from the risk of religious control over our government or schools, particularly in light of the positive contributions of sectarian schools. *Id.* at 400, citing *Wolman, supra*, 433 U.S. at 263 (Powell, J., concurring in part).

The Ninth Circuit roots its subsidy/tax benefit equivalence in cases litigating other constitutional rights. In a free speech challenge to a narrow tax exemption, Justice Scalia explained that "[o]ur opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system,' and the general rule that 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.'" *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J. dissenting), citing *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983). The Ninth Circuit cuts off this quote mid-sentence after the words "tax system" (*Winn v. ACSTO, supra*, 562 F.3d 1002), missing the point: The state was not *obligated* to fund free speech. Justice Scalia would have upheld Minnesota's right to offer a tax-based "subsidy" to fledgling publications without transgressing the free speech rights of other publications.

Similarly, the Ninth Circuit resurrects the *Kotterman* dissent's flawed reasoning, extracting statements from *Rosenberger* out of context:

> [T]he large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 861 n.5 (1995) (Thomas, J., concurring), quoting Donna D. Adler, *The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L. Rev. 855, 862 n.30 (1993). The majority in *Rosenberger* also makes it quite clear that the expenditure of funds that have not and will never enter the public treasury is nevertheless the use of public money subject to scrutiny under the federal Establishment Clause, a provision much less specific than our constitutional provisions. 515 U.S. at 842-43.
>
> *Kotterman, supra*, 193 Ariz. at 309 (Feldman, J., dissenting).

Rosenberger was about granting equal access to a limited speech forum created by a state university. The Establishment Clause did not permit the school to engage in viewpoint discrimination by denying funding to a religious student newspaper. *Rosenberger v. Rector & Visitors, supra*, 515 U.S. at 837-846.

This Court's treatment of tax benefits varies depending on the area of substantive law:

> The Court has fully accepted the equivalence of direct spending programs and tax expenditures in the area of Free Speech rights, but it has not fully applied this concept in the context of Establishment Clause analysis. . . .
>
> Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L. Rev. 855, 857 (1993), quoted in *Kotterman, supra*, 193 Ariz. at 286.

The government is not *required* to subsidize constitutional rights. Tax-exempt status may be denied to a lobbying organization without violating the Free Speech Clause. *Regan v. Taxation With Representation, supra,* 461 U.S. 540. But where religion is involved, courts refuse to regard tax benefits as a form of hidden spending. *Kotterman, supra*, 193 Ariz. at 286; see Joseph M. Kuznicki, *Comment, Section 170, Tax Expenditures, and the First Amendment: The Failure of Charitable Religious Contributions for the Return of a Religious Benefit*, 61 Temp. L. Rev. 443, 473 (1988). This anomaly is best understood against the backdrop of benevolent neutrality: Government *may* grant tax benefits that indirectly subsidize religion or facilitate free exercise. *Walz, supra*, 397 U.S. at 676-677. In contrast to *Rosenberger*, *Arkansas Writers Project*, and *Regan*, the issue is not whether Arizona *must* grant the tax credits, but whether it *may*. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the *Free Exercise Clause*." *Id.* at 673. Arizona is well within the boundaries of permissible accommodation.

The Ninth Circuit engages in legal gymnastics to distance Arizona's tax *credits* from deductions and exemptions. The credits offer dollar-for-dollar reimbursement, while deductions grant partial relief. "Tax credits are therefore a powerful legislative device for directing money to private organizations." *Winn v. ACSTO, supra*, 562 F.3d at 1009. Perhaps, but deductions also provide incentives. Arizona donor-taxpayers direct the flow of their own tax dollars without compulsion from the state or any incentive to direct those funds to a *religious* STO. Moreover, tax *exemptions* also grant dollar-for-dollar benefits, relieving charitable organizations of 100% of the taxes that would otherwise be levied.

The distinction between credits, deduction, and exemptions creates new problems: "If credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions." *Kotterman, supra*, 193 Ariz. at 285. The *Kotterman* dissent would have defined *all* these tax benefits as "public money" because they result in lost revenue for the state, citing the legislative requirement for an annual report of all "tax expenditures"—including deductions, subtractions, exclusions, exemptions, allowances *and credits* (A.R.S. § 42-105). *Id.* at 307 (Feldman, J., dissenting).

This proves too much. *If reporting on fiscal impact determines constitutionality, no tax benefits would survive.* Even this dissenting judge does not go that far: "*Walz* establishes the constitutionality of exemptions due to their neutrality toward religion, using words quite applicable to deductions, credits, and other tax benefits." *Kotterman, supra*, 193 Ariz. at 311 n. 21 (Feldman, J., dissenting). Shifting gears a

few pages later: "The Arizona tax credit...is available *only* for grants to predominantly religious institutions.... It is as invalid as a statute limiting charitable deductions *only* to contributions to religious organizations." *Id.* at 311 (Feldman, J., dissenting) (emphasis added). Such a statute would indeed be unconstitutional, but there is no comparable restraint on Arizona taxpayers. The reader is left to wonder: Is Arizona's tax benefit objectionable because it is a *credit*, or because a multitude of private decisions coincidentally result in an unacceptable level of benefits to religious organizations? The alternative is intolerable—*prohibiting* contributions to religious entities would unlawfully discriminate *against* religion. *Id.*

D. The Arizona Scheme Would Also Survive The State Constitution.

Arizona's elaborate system is even *more* likely than other tax benefit programs to survive scrutiny under its state constitution:

> Any alleged government benefit a religious school receives is so attenuated that it seems unlikely for a court to find any benefit, whether direct or indirect. At no point in the financial operation of these programs does the government disburse public funds, so alleged benefits accruing to a religious school rest merely on an abstract notion of indirectness that has no real boundary. In particular, tax credits for STO contributions are often designed specifically to test this illusive boundary of indirectness, as they require a number of

> entities to participate in the creation of an elaborate chain of financial exchanges.
>
> *Education Tax Credits, supra*, 43 Colum. J.L. & Soc. Probs. at 146-147

This Court has consistently declined to invalidate "any program which in some manner aids an institution with a religious affiliation." *Mueller, supra*, 463 U.S. at 393. Arizona likewise rejects "the strict view that in essence no public monies may be channeled through a religious organization for any purpose whatsoever without, in fact, aiding that church contrary to constitutional mandate." *Cmty. Council v. Jordan*, 102 Ariz. 448, 451, 432 P.2d 460, 463 (1967).

The Arizona Constitution strictly forbids any appropriation of public money for religion. Ariz. Const. art. II, § 12. There is also a high hurdle to jump in funding private education: "No tax shall be laid or appropriation of public money made in aid of any church, *or private or sectarian school*, or any public service corporation." Ariz. Const. art. IX, § 10 (emphasis added). Arizona's strict separation is reminiscent of the Blaine Amendment proposed in the 1870's to bar all aid to sectarian institutions. In spite of congressional rejection, many states adopted similar provisions. *Education Tax Credits, supra* 43 Colum. J.L. & Soc. Probs. at 131 (reporting thirty-seven state "Blaine" amendments).

In light of these restraints it is all the more vital to accommodate and protect religious liberty. Arizona has not rejected religion generally. Churches are tax-exempt. Ariz. Const. art. IX, § 2(2). Apparently this

indirect aid is not considered a grant of public money. *Kotterman, supra*, 193 Ariz. at 287. The Preamble to the Arizona Constitution has strong religious overtones: "We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution." *Id.* at 290. The state motto, "Ditat Deus," means "God enriches." *Id.*, citing Ariz. Const. art. XXII, § 20. The framers most likely understood that the Establishment Clause, along with state counterparts, *protects* religion from government intrusion.

It is reasonable to welcome students of all creeds into the public school, but the state may accommodate families who desire education in a religious environment. Arizona has dodged a deadly bullet by devising a multi-layered private choice program where only a thin thread connects the state with private school funding:

> Consider, for example, the observation in *Kotterman v. Killian* that "no money ever enters the state's control," which is precisely the material difference between how refundable and nonrefundable tax credit programs operate. Given that *state control of funds is uniquely absent* in the processing of a nonrefundable tax credit, such a tax credit program avoids a potentially fatal fact when faced with Blaine Amendment scrutiny.
>
> *Education Tax Credits, supra*, 43 Colum. J.L. & Soc. Probs. at 143 (emphasis added)

CONCLUSION

Arizona "has done *nothing* to cajole parents, STOs, or taxpayers into supporting religious education." *Winn v. ACSTO*, *supra*, 586 F.3d at 668-669 (O'Scannlain, dissenting). On the contrary, its uniquely structured layering of private choice merely adds one more alternative to an already broad array of educational options. The program accommodates religious and parental rights while steering clear of Establishment Clause pitfalls.

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AMICUS CURIAE BRIEF

Supreme Court U.S.
AUG 6 - 2010
OFFICE OF THE CLERK

No. 09-987

IN THE SUPREME COURT OF THE UNITED STATES

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner

v.

KATHLEEN M. WINN,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE LIBERTY COUNSEL AND AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Liberty Counsel has offices in Florida, Virginia and Washington, D.C. and has hundreds of affiliate attorneys in every state. Liberty Counsel represents citizens, organizations and governmental entities in matters related to religious liberties, sanctity of human life and the traditional family. In particular, Liberty Counsel has represented government entities facing Establishment Clause challenges and has seen firsthand how unarticulated and often conflicting

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and such consents are being lodged herewith.

Establishment Clause standards have created confusion among courts and legislators.

The American Association of Christian Schools ("AACS") serves Christian schools and their students through a network of thirty-six state affiliate organizations, including the Christian Schools of Arizona. The AACS represents more than one hundred thousand students in more than eight hundred schools. Nine of those schools are in Arizona. The Arizona tax credit program has been a wonderful vehicle for allowing parents who are not wealthy to exercise a choice in their children's education that previously only those who were more prosperous could exercise. Single mothers and factory workers can now choose a school that best meets the needs of their children, funded by a scholarship from a School Tuition Organization. AACS believes that such freedom is the most effective and equitable way to improve the quality of K-12 education in America. Individuals and corporations may freely choose the School Tuition Organization to which they contribute. Parents may freely choose the STO and through it the school that a child will attend. The State of Arizona establishes no particular religion, but establishes an environment in which diversity, individual choice and educational quality can flourish. The AACS

fully supports those core values and applauds the State of Arizona for this remarkable and critical effort to offer educational choice and to foster educational quality.

Amici are concerned about the detrimental effects that the Ninth Circuit's ruling, and particularly its reliance upon largely discredited Establishment Clause concepts, will have on educational assistance programs that provide parents with choices in how to educate their children in a constitutionally permissible manner. Amici believe that it is critical that this Court has as complete a picture as possible of the ramifications of some existing Establishment Clause principles and whether some of them should be abandoned in favor of a more uniform objective standard.

SUMMARY OF ARGUMENT

The Ninth Circuit capitalized on three weak spots in this Court's Establishment Clause jurisprudence to overturn a neutral program of private choice where state aid reaches religious schools solely as a result of independent decisions of private individuals, in direct contravention of this Court's ruling in *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). First, the Ninth Circuit took advantage of the lack of definition of the "reasonable

observer" standard to create its own version of the fictional character. The Ninth Circuit concluded that its informed reasonable observer would find that the taxpayer choice provision in the Arizona law thwarts the law's secular purpose of providing equal access to various educational choices because there is nothing to prevent taxpayers from only contributing to religious schools. *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002, 1022 (9th Cir. 2009) *petition for rehearing en banc denied*, 586 F.3d 649 (9th Cir. 2009). This manipulation of the endorsement test exposes its inherent weakness as an objective standard and demonstrates why it should be abandoned.

From there, the Ninth Circuit unearthed a barely alive educational aid precedent, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) and propped it up as viable authority for the proposition that Arizona's tax credit law violates the Establishment Clause because it imposes an additional layer of private choice on scholarship funding decisions over those in place in the program upheld in *Zelman*. That additional layer of insulation between the state and the religious institutions meant that the Arizona statute was significantly different from the Ohio statute in *Zelman*. Therefore, the

Ninth Circuit concluded that it did not need to apply *Zelman*, but could fall back on *Nyquist* to overturn Arizona's law. The Ninth Circuit could perform this sleight of hand because *Nyquist* has been implicitly but not explicitly overruled by *Zelman*, and other subsequent school funding cases. *Nyquist* should be explicitly overruled to prevent future attempts to circumvent established precedent.

Finally, the Ninth Circuit used a procedural technicality to resurrect the "pervasively sectarian" doctrine, which a plurality of this Court has said should be buried as a tarnished relic of a bygone era. Although the decision in *Mitchell v. Helms*, 530 U.S. 793 (2000) effectively killed the ailing "pervasively sectarian" doctrine, there were only four signatories on that portion of the decision. The Ninth Circuit took advantage of the fact that two concurring justices did not explicitly sign on to the plurality's determination that the doctrine was dead to claim that it remains viable. Based upon that, the Ninth Circuit used the "pervasively sectarian" doctrine to bolster its claim that the Arizona tax credit law violates the Establishment Clause. As is true with *Nyquist*, it is time for the "pervasively sectarian" doctrine to be buried once and for all.

LEGAL ARGUMENT

I. THIS COURT SHOULD DISMANTLE THE ENDORSEMENT TEST MINEFIELD AND GIVE CLEAR GUIDANCE TO LEGISLATURES SO THAT THEY CAN ENACT LAWS WITHOUT FEAR OF STEPPING ON LANDMINES.

This Court has repeatedly held that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement." *Zelman*, 536 U.S. at 655 (citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't. of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)). Nevertheless, the Ninth Circuit constructed its own "informed reasonable observer" to find such an endorsement in the Arizona law. This manipulation of the "reasonable observer" standard illustrates how the endorsement test has become a minefield for legislators as they try to craft legislation without inadvertently violating the unarticulated sensibilities of an undefined "reasonable observer" who might perceive that the state is endorsing religion. *See Capitol*

Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995). As one constitutional scholar stated:

> Under the endorsement approach, reasonable perceptions of state approval or endorsement which beget legitimate feelings of alienation or offense by a segment of the population–and nothing more –trigger a holding of unconstitutionality. While this may indeed be an attractive feature of the test insofar as it appeals to our compassionate instincts...absent any meaningful threat to religious liberty, distressed sensibilities should not rise to the level of a judicially cognizable harm under the Establishment Clause because, if the endorsement threshold were faithfully applied, it would unjustifiably operate to invalidate desirable governmental attempts to accommodate religious interests as

> well as improperly authorize official injury to religious liberty.[2]

As is true with the Arizona law in this case, "[m]ost government action that alienates or offends people because it is seen as approving or endorsing religion is not the product of a deliberate government effort to be pejorative toward those who are aggrieved."[3] "Rather, it results from the adoption of well meaning, legitimate, and sometimes even successful attempts to improve the conditions of society."[4] "In our pluralistic culture, 'not all beliefs can achieve recognition and ratification in the nation's laws and public policies; and those whose positions are not so favored will sometimes feel like 'outsiders.'"[5] "It is clear that the Constitution cannot generally provide relief when this occurs."[6]

Nevertheless, that is precisely what the endorsement test and its "reasonable observer" standard has done. It has given veto power to

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[2] Jesse H. Choper, *The Endorsement Test: Its Status And Desirability*, 18 J. L. & POL'Y 499, 521 (2002).

[3] *Id.* at 523.

[4] *Id.*

[5] *Id.*

[6] *Id.*

anyone who might feel slighted by a government action or program that, from their perspective, gives too much attention to or provides too much support, even tangentially, for a religious institution. The inconsistent rulings among and within the circuits and even within decisions by this Court illustrate how the endorsement test is not the kind of objective standard necessary to analyze Establishment Clause claims.

A. The Poorly Articulated "Reasonable Observer" Standard Makes The Endorsement Test Inadequate As A Standard For Establishment Clause Claims.

At the center of the endorsement test is the hypothetical "reasonable observer." Despite his centrality to the test, this "reasonable observer" has not been clearly defined. Neither his qualities and characteristics nor his level of knowledge have been clearly articulated, "ultimately leaving us with the uncomfortable inclination that this purely fictitious character will perceive precisely as much, and only as much, as its author wants it to perceive."[7] The conflict between the Ninth Circuit's "reasonable

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[7] *Id.*

observer" who would find Arizona's educational assistance program unconstitutional, and the "reasonable observers" who would have found similar programs in Ohio, Louisiana, Washington, Minnesota, Maryland, South Carolina, Connecticut and New York constitutional[8] aptly illustrate the truth of that proposition.

Similarly, conflicts within and between the circuits regarding the constitutionality of identical Ten Commandments displays illustrate how the standard-less "reasonable observer" criterion has led to contradictory rulings and made the endorsement test unworkable for analyzing Establishment Clause challenges. Identical displays of nine historical documents, including the Ten

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[8] *See Zelman*, 536 U.S. at 639 (vouchers); *Mitchell v. Helms*, 530 U.S. 793 (2000) (educational materials); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)(scholarship); *Mueller v. Allen*, 463 U.S. 388 (1983) (tuition tax deduction); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976) (grants to private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973)(revenue bonds for colleges); *Tilton v. Richardson*, 403 U.S. 672 (1971) (grants for colleges); *Board of Education v. Allen*, 392 U.S. 236 (1968) (loan of textbooks).

Commandments ("Foundations Displays"), were donated by private parties to several counties in Kentucky, Indiana and other states. Using the "reasonable observer" perspective, district courts reached radically different results. The United States District Court for the Western District of Kentucky found that a reasonable observer in Grayson County would find the display unconstitutional. *ACLU of Ky. v. Grayson County*, 2008 WL 859179 (W.D. Ky. 2008), *rev'd on appeal* 591 F.3d 837 (6th Cir. 2010), *reh'g denied*, 605 F.3d 426 (6th Cir. 2010). One judge in the Eastern District of Kentucky found that a reasonable observer viewing the same display in Mercer County would not see any endorsement. *ACLU of Ky. v. Mercer County*, 219 F.Supp. 2d 777, 790 (E.D. Ky. 2002).[9] However, other judges in the same district found that reasonable observers in Garrard, McCreary and Pulaski counties would

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[9] In the cited decision, the district court denied Plaintiffs' motion for a preliminary injunction. The court later granted summary judgment in favor of Mercer County, *ACLU of Ky. v. Mercer County*, 240 F.Supp. 2d 623 (E.D. Ky. 2003). The Sixth Circuit affirmed. *ACLU of Ky. v. Mercer County*,432 F.3d 624 (6th Cir. 2005), reh'g en banc denied, 446 F.3d 651 (6th Cir. 2006).

see endorsement because of prior stand alone displays and other events that occurred nearly a decade earlier. *ACLU v. Garrard County*, 517 F. Supp. 2d 925, 944 (E.D. Ky. 2007); *ACLU v. McCreary County*, 2007 WL 2903210 (E.D.Ky. 2007), *aff'd* 607 F. 3d 439 (6th Cir. 2010). Another Eastern District judge reviewing the display in Rowan County, which, like Garrard, McCreary and Pulaski, had a history of stand-alone Ten Commandments displays, found no endorsement. *ACLU v. Rowan County*, 513 F. Supp. 2d 889, 903 (E.D.Ky. 2007). The Sixth Circuit produced similarly inconsistent results, finding the displays constitutional in Mercer and Grayson counties, but not in McCreary and Pulaski. *Mercer County*, 432 F.3d 624; *Grayson County*, 591 F.3d 837; *McCreary County*, 607 F. 3d 439.

Upholding the same display in Elkhart County, Indiana, the Seventh Circuit attempted to inject some clarity into the reasonable observer test. *Books v. Elkhart County*, 401 F.3d 857, 867 (7th Cir. 2005). "The effect of a display of a religious object on public property is evaluated against an objective, reasonable person standard, not from the standpoint of the hypersensitive or easily offended." *Id.* "Thus, 'we do not ask whether there is any person who could find an endorsement of religion, whether some people

may be offended by the display, or whether some reasonable person might think [the State] endorses religion.'" *Id.* (citations omitted). "Rather, we ask whether an objective, reasonable observer, 'aware of the history and context of the community and forum in which the religious display appears,' would fairly understand the display to be a government endorsement of religion.'" *Id.* "This standard presupposes a person of ordinary understanding and sensibility, familiar with the circumstances surrounding the display." *Id.* "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Id.* Under that definition, the Seventh Circuit found that the "reasonable observer" would "think history, not religion." *Id.* at 869. As the other Foundations Display cases illustrate, even this attempt to add some depth to the definition of the reasonable observer has failed to yield consistent results.

Other circuit cases addressing religious displays reflect similar inconsistencies. The Third Circuit found an annual crèche and menorah display which was part of a year-round celebration of different cultures and religions in Jersey City, New Jersey unconstitutional. *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1448 (3d Cir. 1997).

"We cannot agree that an observer of the display who is a new resident to Jersey City, has no understanding of the history of the community, but has a strong sense of his or her own faith, a faith not depicted in the display, is somehow less 'reasonable' and observer than the Christian or Jewish observer who has lived in Jersey City for twenty years." *Id.* The Sixth Circuit held that a Japanese "Friendship Bell" on display in a public park was not an unconstitutional endorsement of Buddhism. *Brooks v. City of Oak Ridge*, 222 F.3d 259, 266 (6th Cir. 2000). The *Brooks* court found that the "reasonable observer" would know about the bell casting ceremony, as well as about the history of the bell's adoption as a celebratory display for Oak Ridge's fiftieth birthday and the city's official statement of secular purpose to commemorate Oak Ridge's historic connection to Japan and to express a desire for international peace and friendship." *Id.* However, the Ninth Circuit found that a "reasonable observer" would be aware that a serpent statue represented an ancient Aztec deity but would not be aware of the statue's connection to New Age and Mormon religions because "the reasonable observer is not an expert on esoteric religions." *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996).

This patchwork of inconsistent results reflects, as the Seventh Circuit has observed, that the unarticulated "reasonable observer" standard has created an unresolved dispute within the circuits regarding "the proper level of understanding to impute onto our mythical reasonable observer." *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 496 n. 2 (7th Cir. 2000). That unresolved dispute is also apparent within this Court's decisions, which offers the strongest argument for jettisoning the endorsement test.

B. Fractured, Internally Inconsistent Opinions By Members of This Court Demonstrate That The Enforcement Test Is An Unworkable Standard.

The unworkability of the endorsement test is most apparent in the conflicts among members of this Court who have often reached different conclusions regarding the constitutionality of the same program or display based upon different perceptions of the "reasonable observer." Justice Kennedy's observations about the majority's version of the endorsement test in *County of Allegheny v. ACLU*, accurately describes how the test overall has become an ineffective standard.

County of Allegheny, 492 U.S. 573, 675-676 (1989) (Kennedy, J. dissenting).

> This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication. "It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended – but would have been less so were the crèche five feet closer to the jumbo candy cane." *American Jewish Congress v. Chicago*, 827 F.2d 120, 130 (CA7 1987) (Easterbrook, J., dissenting).

Id. Rather than providing an objective, neutral standard for courts to use when analyzing Establishment Clause challenges and

legislatures to use when drafting legislation, the endorsement test and its "reasonable observer" standard have only further complicated what was already a labyrinthine constitutional analysis. That is most apparent in the internally inconsistent results in some of this Court's prominent Establishment Clause cases.

A reasonable observer in Pawtucket Rhode Island would not view the city's Christmas display that included a creche, Santa Claus house, reindeer, candy-striped poles, a Christmas tree and carolers as endorsing religion, according to Justice O'Connor. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). "Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display." Justices Brennan, Marshall, Blackmun and Stevens disagreed: "For many, the City's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing 'a significant symbolic benefit to religion...." *Id.* at 701 (Brennan, J. dissenting).

The holiday displays in the Allegheny County courthouse resulted in equally fractured rulings under the endorsement test. *County of Allegheny*, 492 U.S. 573. One of the displays challenged in the case was a creche placed in the county courthouse and the other a display that included a menorah, Christmas tree, and sign saluting liberty in front of the city-county building. *Id.* at 587. Analyzing the tree and menorah display, the plurality found that a reasonable observer would not view the addition of the menorah to the tree display as an endorsement of the Christian and Jewish faiths. *Id.* at 620. Justice O'Connor said that the display "conveyed a message of pluralism and freedom of belief during the holiday season." *Id.* at 635 (O'Connor, J. concurring). "A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." *Id.* at 635-636. Justice Brennan stated that the reasonable observer could not overlook the "religious significance" of the Christmas tree when it is placed next to a menorah. *Id.* at 641 (Brennan, J., concurring in party and dissenting in part). "I shudder to think that the only 'reasonable observer' is one

who shares the particular views on perspective, spacing and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law." *Id.* at 642-643. Justice Stevens also found that the reasonable observer would find that the "presence of the Chanukah menorah, unquestionably a religious symbol, gives religious significance to the Christmas tree. The overall display thus manifests governmental approval of the Jewish and Christian religions." *Id.* at 654 (Stevens, J., concurring in part and dissenting in part).

In *Pinette*, Justice O'Connor found that the reasonable observer looking at the Ku Klux Klan's display of a Latin cross in a plaza next to the state capital "would view the Klan's cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct." *Pinette*, 515 U.S. at 782 (O'Connor, J., concurring in part and concurring in the judgment). "Moreover, this observer would certainly be able to read and understand an adequate disclaimer, which the Klan had informed the State it would include in the display at the time it applied for the permit, and the content of which the Board could have defined as it deemed necessary as a condition of

granting the Klan's application." *Id.* By contrast, Justice Stevens found "a reasonable observer would likely infer endorsement from the location of the cross erected by the Klan in this case. Even if the disclaimer at the foot of the cross (which stated that the cross was placed there by a private organization) were legible, that inference would remain, because a property owner's decision to allow a third party to place a sign on her property conveys the same message of endorsement as if she had erected it herself." *Id.* at 806 (Stevens, J., dissenting). Justice Ginsburg similarly held that a reasonable observer viewing the stand-alone cross and aware of the fact that "no human speaker was present to disassociate the religious symbol from the State....No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message" would conclude that the state endorsed the display. *Id.* at 817 (Ginsburg, J., dissenting).

Applying the "reasonable observer" standard to a school funding case, Justice O'Connor determined that the observer would be able to readily discern between a program that offered direct aid to religious schools based upon student population and a program that

offered aid directly to students who then chose to use it for a religious school. *Mitchell v. Helms*, 530 U.S. 793, 842-843 (2000) (O'Connor, J., concurring).

> In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion. That the amount of aid received by the school is based on the school's enrollment does not separate the government from the endorsement of the religious message. The aid formula does not-and could not-indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school, who each affirmatively choose to direct the secular government aid to the school and its religious mission. No such choices have been made. In

> contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "[n]o reasonable observer is likely to draw from the facts ... an inference that the State itself is endorsing a religious practice or belief."... Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

Id. (citation omitted).

As Justice Scalia observed in *Pinette*, the justices' disagreement about whether the "hypothetical beholder who will be the determinant of 'endorsement' should be any beholder (no matter how unknowledgeable), or the average beholder, or (what Justice STEVENS accuses the concurrence of favoring) the 'ultra-reasonable' beholder" shows how the endorsement test has led to "invited chaos." *Pinette*, 515 U.S. at 768. "And, of course, even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any

beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield." *Id.*

As one commentator observed, the endorsement test contains insoluble difficulties that render the test incomprehensible.[10] "Is the objective observer (or average person) a religious person, an agnostic, a separationist, a person sharing the predominate religious sensibility of the community, or one holding a minority view? Is there any 'correct' perception?"[11] One problem with the test, he said, is that it "attempts to objectify that which avoids objectification."[12] The test "incorrectly assumes that the symbolic inquiry is reducible to a rational construct, while the interpretation of symbols, and perhaps religion itself, is inherently irrational. Objectifying the inquiry in this manner is, as the idiom suggests, to place a square peg in a round hole."[13]

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10 William P. Marshall, *"We Know it When We See It." The Supreme Court Establishment*, 50 S. CAL. L.REV. 495, 536-537 (1986).

11 *Id.* at 537.

12 *Id.* at 536.

13 *Id.*

The Ninth Circuit attempted that feat again when it used the endorsement test to invalidate an Arizona school tax credit a law virtually identical to laws other courts, including this Court, have found valid. The ruling illustrates how the unarticulated standards of the test have led to inconsistent rulings that often "disrupt the settled principle that policies providing incidental benefits to religion do not contravene the Establishment Clause." *Pinette* 515 U.S. at 768. "It has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may–even reasonably–confuse an incidental benefit to religion with state endorsement." *Id.* Those radical implications are manifested in the Ninth Circuit's ruling.

The fractured results spawned by the endorsement test show why it should be abandoned as an intellectually incoherent legal standard. With few exceptions, "the outcome of any constitutional case judged under the endorsement/objective observer analysis can be changed by simply altering the characteristics of the observer."[14] Such an ad-hoc, fact-specific standard does not afford government officials

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[14] Choper, *The Endorsement Test*, at 513-514.

the kind of objective, predictable standard needed to craft legislation that will withstand constitutional scrutiny.[15] Therefore, it should be abandoned.

II. THE NINTH CIRCUIT'S RELIANCE UPON *NYQUIST* TO OVERTURN ARIZONA'S SCHOOL TAX CREDIT STATUTE DEMONSTRATES THAT *NYQUIST* SHOULD BE EXPLICITLY OVERRULED.

The Ninth Circuit used the *Zelman* Court's failure to overrule *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S., 756 (1973) to find a loophole which it could use to conclude that the Arizona educational assistance program was a disguised attempt to circumvent the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002) The Ninth Circuit's manipulation of *Nyquist* to find an Establishment Clause violation where there is none demonstrates that it is time to explicitly overrule *Nyquist*.

The Ninth Circuit's explanation for relying upon *Nyquist* instead of the more recent and relevant decision in *Zelman* reveals the

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[15] *Id.* at 514.

danger of leaving *Nyquist* as a viable precedent. Until *Nyquist* is explicitly overruled, it will continue to be used, as it was here, when courts are looking for a way to invalidate facially neutral tax credit programs when some individuals use them to benefit religious schools.

> In *Zelman*, the Court held "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662, 122 S.Ct. 2460. As discussed above, Section 1089 does not "offer aid directly to individual recipients," but rather mediates the aid through taxpayers and STOs. Insofar as Section 1089 is not a "program of true private choice," within the meaning of *Zelman*, the Court's holding in *Nyquist* is relevant to determining whether a reasonable observer would conclude the tax credit program endorses religion.

Winn, 562 F.3d at 1021. "*Nyquist* illustrates that if an educational assistance program provides individual choice through tax credits,

but those tax credits hinder the program's ability to achieve its valid secular goals, a reasonable observer could well conclude that the tax credits are simply masking an Establishment Clause violation." *Id.*

Arizona's program is substantially similar to the program upheld in *Zelman*. Nevertheless, the Ninth Circuit found that "Section 1089 is not a program of true private choice immune from further constitutional scrutiny" under *Zelman*, but was susceptible to invalidation under *Nyquist*. *Id.* The panel capitalized on the continuing viability of *Nyquist* to create a non-existent constitutionally significant distinction between the neutral educational assistance program aimed at parents in *Zelman* and the neutral educational assistance program aimed at taxpayers in this case. In other words, since *Nyquist* has not been overruled, the Ninth Circuit could use it to "unmask" an Establishment Clause violation the panel believed was lurking in shadows of the statute. The Ninth Circuit reasoned that because the recipients of educational assistance (taxpayers) were different in Section 1089 than were the recipients of assistance in the Ohio statute in *Zelman* (parents), it could distinguish *Zelman* and go back to *Nyquist* to find an Establishment Clause violation.

The Ninth Circuit's actions illustrate how, as former Chief Justice Burger observed in his dissent, the perspective adopted by the majority in *Nyquist* created a dangerous precedent that undercuts this Court's basic principles for analyzing Establishment Clause claims. *Nyquist*, 413 U.S. at 799 (Burger, C.J. concurring in part, dissenting in part). Referencing *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 392 U.S. 236 (1968), Chief Justice Burger said:

> While there is no straight line running through our decisions interpreting the Establishment and Free Exercise Clauses of the First Amendment, our cases do, it seems to me, lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship.

Id. For example, in *Everson*, the Court held that a New Jersey township could reimburse all

parents of school-age children for bus fares paid in transporting their children to school, even though it might benefit students attending religious schools. *Everson*, 330 U.S. at 18. The New Jersey legislation, as applied, "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* Similarly, in *Allen*, The Court upheld a statute that required the public schools to loan textbooks, without charge, to all seventh to twelfth grade students, including those in private schools. *Allen*, 392 U.S. at 238. Citing to *Everson*, the *Allen* court held that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation." *Id.* at 241-242. The law merely makes available to all children the benefits of a general program to use books free of charge. *Id.* at 243-244. No funds were spent and no books were furnished to parochial schools, and the financial benefit accrued to parents and children, not to schools, so the program did not violate the Establishment Clause. *Id.*

As Chief Justice Burger pointed out in his *Nyquist* dissent:

> The Court's opinions in both *Everson* and *Allen* recognized that

> the statutory programs at issue there may well have facilitated the decision of many parents to send their children to religious schools. *Everson v. Board of Education, supra*, 330 U.S., at 17-18, 67 S.Ct., at 512-513; *Board of Education v. Allen, supra*, 392 U.S., at 242, 244, 88 S.Ct., at 1925, 1927. *See Norwood v. Harrison*, 413 U.S. 455, at 463 n. 6, 93 S.Ct. 2804, at 2810, 37 L.Ed.2d 723 (1973). Indeed, the Court in both cases specifically acknowledged that some children might not obtain religious instruction but for the benefits provided by the State. Notwithstanding, the Court held that such an indirect or incidental 'benefit' to the religious institutions that sponsored parochial schools was not a conclusive indicium of a 'law respecting an establishment of religion.

Nyquist, 413 U.S. at 800 (Burger, C.J. concurring in party and dissenting in part). The essence of these decisions is that "government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Id.* at 801. "Where the

state law is genuinely directed at enhancing a recognized freedom of individuals, even one involving both secular and religious consequences, such as the rights of parents to send their children to private schools, the Establishment Clause no longer has a prohibitive effect." *Id.* (internal citations omitted). That conclusion reflects the principle that "the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families." *Id.* at 802. That judgment in turn "reflects the caution with which we scrutinize any effort to give official support to religion and the tolerance with which we treat general welfare legislation." *Id.*

The *Nyquist* majority abandoned that reasoned approach in favor of the "unsupportable approach of measuring the 'effect' of a law by the percentage of the recipients who choose to use the money for religious, rather than secular, education." *Id.* at 804. In other words, the *Nyquist* court improperly focused on the effects of the beneficiaries' choices under the law instead of whether the state did anything to steer those choices in the direction of religious institutions. As Chief Justice Burger observed, that

improper shift in focus, followed to its logical conclusion would subject government assistance programs such as social security benefits or "G.I. Bill" payments, which beneficiaries direct to religious institutions, to invalidation. *Id.*

This Court has addressed the fallout from the *Nyquist* Court's shift in focus in a series of cases which have clarified that benefits accruing to religious institutions as a result of beneficiaries' choices **do not** violate the Establishment Clause. *In Mueller v. Allen*, 463 U.S. 388, 397 (1983), this Court addressed some of the problems that had arisen as a result of *Nyquist* when it rejected an Establishment Clause challenge to a Minnesota program that provided tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96 percent) were parents of children in religious schools. The *Mueller* court said that the fact that the vast majority of beneficiaries of the program were parents of children in religious schools was irrelevant to the constitutional analysis. Similarly, in *Witters v. Washington Department of Services for Blind*, 474 U.S. 481, 487 (1986), the Court rejected an Establishment Clause challenge to a vocational scholarship program that provided tuition aid

to a student studying at a religious institution to become a pastor, noting that "[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." Finally, in *Zelman*, this Court removed any remaining doubt about the constitutionality of government educational aid programs which provide benefits to individuals who independently choose how to apply the funds, even when the choices are predominately religious. *Zelman*, 536 U.S. at 662.

These post-*Nyquist* rulings should have settled the question of the constitutionality of educational assistance programs through which third parties independently direct some funds to religious institutions. However, since this Court did not explicitly overrule *Nyquist*, it left open a window of opportunity for appellate courts to enter when they want to strike down a program they believe provides too much assistance to religious organizations. That is what the Ninth Circuit did here. It used an inconsequential difference in wording to create a "constitutionally significant" difference between the Ohio plan in *Zelman* and Arizona's plan in this case. *Winn v. Arizona Christian School Tuition Organization*, 586 F.3d 649, 664 n.12 (9th Cir. 2009) (denial of petition for

rehearing *en banc*) (O'Scannlain, J. dissenting). The panel took full advantage of a procedural technicality to ignore the clear holding in *Zelman* and invalidate Arizona's educational assistance program because it directed benefits to taxpayers whose choices have created a greater availability of assistance to religious schools than to non-religious. The result is a holding that violates the principles established in *Everson*, *Allen* and other precedents: "We therefore hold that plaintiffs have alleged facts upon which a reasonable, informed observer could conclude that Section 1089, as applied, violates the Establishment Clause *even though the state does not directly decide whether any particular sectarian organizations will receive program aid.*" *Winn*, 562 F.3d at 1021 (emphasis added). Since *Everson* and *Allen* established that the Establishment Clause does not prohibit programs in which "the state does not directly decide whether sectarian organizations will receive program aid," the Ninth Circuit's conclusion is an inherent contradiction.

The fact that the Ninth Circuit could use *Nyquist* to reach such a conclusion illustrates that the precedent should be explicitly overruled. *Nyquist* is little more than an empty shell, and appellate courts should not be permitted to use that shell as a loophole

through which to contradict this Court's established precedent.

III. THE NINTH CIRCUIT'S USE OF THE "PERVASIVELY SECTARIAN" DOCTRINE ILLUSTRATES THAT THE DOCTRINE SHOULD BE EUTHANIZED AND BURIED AS A CONSTITUTIONALLY OFFENSIVE RELIC OF THE PAST.

A plurality of this Court's has rejected the "pervasively sectarian" doctrine as "born of bigotry, [which] should be buried now." *Mitchell v. Helms*, 530 U.S. 793, 829 (2000)(plurality opinion). However, because two justices concurring in the judgment did not explicitly reject the doctrine, the Ninth Circuit determined that the doctrine was still viable and alluded to it as authority for its invalidation of Arizona's educational assistance program. *See Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002, 1013, 1019 (9th Cir. 2009) (panel opinion); *Winn*, 586 F.3d 649 655 (9th Cir. 2009) (denial of rehearing *en banc*). Other circuit courts have similarly argued that the "pervasively sectarian" doctrine remains viable in order to invalidate otherwise permissible government

aid programs.[16] These inconsistent rulings have added mines to the Establishment Clause minefield through which legislatures are forced to walk. This Court should clear away these mines by declaring, once and for all, that the "pervasively sectarian" doctrine is dead.

In his plurality opinion in *Mitchell*, Justice Thomas offered several reasons why the "pervasively sectarian" doctrine should be explicitly overruled. *Mitchell*, 530 U.S. at 826. Those reasons are equally apparent in the Ninth Circuit's decision. Further illustrating why the doctrine should be abandoned. First and foremost, the "pervasively sectarian" doctrine "has a shameful pedigree" born of animus toward sectarian schools, and particularly Roman Catholic schools, which resulted in an hostility toward religion that itself was improper under the Constitution. *See generally, id.* at 828.

> Opposition to aid to 'sectarian' schools acquired prominence in the

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[16] *See, e.g., Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 613-614 (7th Cir. 2001) (like the Ninth Circuit, claiming that *Nyquist* was not explicitly overruled and therefore could be relied upon to invalidate a funding program)

> 1870s with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair*, 413 U.S. [734], at 743, 93 S.Ct. 2868 [(1973)], it coined the term "pervasively sectarian"–a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools.

Id. at 828-829. While the term "pervasively sectarian" first appeared in *Hunt*, it actually arose from the Court's analysis of the educational assistance programs in *Lemon v.*

Kurtzman, 403 U.S. 602 (1971). In *Lemon*, the court engaged in an intrusive examination of the proximity of churches to religious schools receiving assistance, the religious symbols present in the school buildings, the time spent in religious instruction, the "atmosphere" of the schools, the makeup of the faculty and the nature of school governance. *Id.* at 615-616. Based upon that examination, the Court struck down the programs for violating the "excessive entanglement" prong of the newly minted *Lemon* test. *Id.* at 618-619. Following that lead, the *Hunt* court engaged in a similar inquiry and held that the Establishment Clause prohibits government fund of "institutions in which religion is so pervasive that a substantial portion of its funds are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt*, 413 U.S. at 743.

In subsequent cases various pluralities of the Court continued to engage in intrusive examinations of the doctrines and practices of religious schools in order to determine whether they were "pervasively sectarian" and therefore prohibited from receiving government aid. "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious

values and belief." *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (plurality opinion)(*overruled in Mitchell*). "Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole." *Id.* Therefore, "direct aid to the predominantly church-related nonpublic schools inescapably results in the direct and substantial advancement of religious activity, and thus constitutes an impermissible establishment of religion." *Id.* In *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), the Court again engaged in an intrusive examination of four Roman Catholic colleges in order to determine whether they were "pervasively sectarian" and therefore prohibited from benefitting from governmental aid. In that case, the plurality found that the colleges were not "pervasively sectarian," and since state law prohibited use of the funds for religious activity, the challenged statute did not violate the Establishment Clause. *Id.* at 758-759.

In *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 648 (1980), the Court seemed to back away from prohibiting aid to "pervasively sectarian" schools by upholding a New York program of direct cash reimbursements of the actual costs of the religious schools for preparation and

grading of state-mandated tests. The majority said that *Meek* did not prohibit all aid to sectarian schools, but only aid that could not be proven to be benefitting solely secular instruction. *Id.* at 850. The dissent called the continuing validity of the "pervasively sectarian" into question, but the majority did not explicitly overrule it. *Id.* at 667-668. In *Mueller* the Court seemed to step further away from the strict application of the doctrine when it upheld the Minnesota tuition tax deduction statute. *Mueller*, 463 U.S. at 398-399. The *Mueller* court said that the private choices in the Minnesota law meant that there was no "imprimatur of state approval" conferred on any particular religion or on religion generally. *Id* at 399. Although it created the independent funding paradigm that significantly undercut the "pervasively sectarian" doctrine, the majority did not explicitly overrule it. *Id.* Consequently, it was resurrected two years later in *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Those decisions were overruled by *Agostini v. Felton*, 521 U.S. 203 (1997), but the doctrine, again, was not explicitly overruled.

As a result, as Justice Thomas noted in *Mitchell*, the "pervasively sectarian" doctrine continued to rear its head even while the Court

upheld state educational assistance laws that indirectly benefitted religious schools. *Mitchell*, 530 U.S. at 828-829. The Ninth Circuit's most recent allusion to the doctrine is the latest example of this phenomenon. The court engaged in herculean efforts to prove that the neutral tax credit law is a disguised attempt to funnel money to "religious schools" to the detriment of secular schools and made particular mention of the Catholic Tuition Organization. *Winn*, 562 F.3d at 1016. The religious hostility Justice Thomas described in *Mitchell* remains a problem, which further illustrates why the "pervasively sectarian" doctrine should be fully and finally rejected.

The Ninth Circuit's ruling also illustrates that the "special hostility" to sincere religious beliefs Justice Thomas cautioned against in *Mitchell* continue to surface as courts continue to apply the "pervasively sectarian" doctrine. The Ninth Circuit placed particular emphasis on the fact that the vast majority of scholarship money is only available for religious private schools. *Winn*, 562 U.S. at 1017. However, "[i]f a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be." *Mitchell*, 530

U.S. at 827-828. "The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." *Id.* In other words, "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose." *Id.* at 827. Similarly, in this case, the religious schools, including Catholic schools, have not received any special favor from the State of Arizona, which makes tax credits available for scholarships to religious, "areligious and irreligious" schools alike. Arizona has not supported a particular, or any, religious viewpoint. The Ninth Circuit's allusion to the "pervasively sectarian" doctrine to find a constitutional violation illustrates the danger posed by keeping the doctrine alive.

Furthermore, inquiring into the religious views of scholarship recipients, which is required under the "pervasively sectarian" doctrine, "is not only unnecessary but also offensive." *Id.* at 828. "It is well established, in numerous other contexts, that courts should

refrain from trolling through a person's or institution's religious beliefs." *Id.* (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887 (1990)).

"In addition, and related, the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity. *Id.* (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) and *Widmar v. Vincent*, 454 U.S. 263 (1981)). That collision is eminently apparent when the Ninth Circuit's ruling in this case is contrasted with its rulings regarding equal access and other government benefits. For example, in *Hills v. Scottsdale Unified School District No. 48*, 329 F.3d 1044, 1052 (9th Cir. 2003), the court cited to *Lamb's Chapel* and overturned a school district policy that granted access to organizations to distribute informational flyers but denied access to a religious organization. "Premising refusal of permission to advertise an event or class based on the religious nature of the event or class cannot be justified under our precedents, where other similar groups can advertise events or classes similar except for their lack of religious viewpoint." *Id. See also,*

Prince v. Jacoby, 303 F.3d 1074, 1092 (9th Cir. 2002) (invalidating a school policy denied access to a Christian club while granting access to similar secular clubs). By contrast, in this case, the Ninth Circuit is premising invalidation of the Arizona tax credit law upon the religious nature of the recipients. *Winn*, 562 U.S. at 1017. If Arizona must exclude or limit "pervasively sectarian" schools as recipients of tax credit dollars to comport with the Establishment Clause, then how can it avoid violating the First Amendment under *Hills* and *Jacoby* by denying religious schools access to scholarship funds?

Using the "pervasively sectarian" doctrine as the Ninth Circuit does here fosters discrimination on the basis of religion. That irreconcilable conflict with *Rosenberger*, *Lamb's Chapel* and *Widmar* illustrates why the "pervasively sectarian" doctrine must be explicitly overruled. This Court has not relied upon the doctrine to overturn a benefit program since 1985 (*Aguilar*), but the lack of a fifth vote for Justice Thomas' eulogy for the doctrine has permitted lower courts to continue to resuscitate it to invalidate otherwise valid programs. That procedural technicality should not be permitted to undermine *Mitchell* and other recent precedent which uphold

educational assistance programs virtually identical to Arizona's.

"In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it." *Mitchell*, 530 U.S. at 829. The Ninth Circuit's allusion to the doctrine in its ruling demonstrates that what was true in 2000 is even more true today: "This doctrine, born of bigotry, should be buried now." *Id.*

CONCLUSION

The Ninth Circuit's ruling invalidating an education assistance program substantially similar to the Ohio program this Court upheld in *Zelman* emphasizes three lingering issues that cloud this Court's Establishment Clause jurisprudence. The unarticulated "reasonable observer" standard central to the endorsement test is an unworkable concept that leads to inconsistent, even contradictory, results. The continuing viability of *Nyquist* as a precedent for educational assistance programs creates a loophole that permits appellate courts to circumvent establish precedent to reach a desired result. Finally, the "pervasively sectarian" doctrine places the Establishment Clause and Free Exercise Clause at odds in a way that prevents legislatures and courts from

developing programs that meet state interests in education and general welfare without infringing constitutional rights. The Ninth Circuit used all of these factors to reach its conclusion that Arizona' tax credit program is unconstitutional.

Because the continuing use of these three concepts can lead to unprincipled results, this Court should explicitly abandon them.

Dated August 6, 2010.

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AMICUS CURIAE BRIEF

Nos. 09-987 & 09-991

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, *ET AL.*,
Respondents.

GALE GARRIOTT,
Petitioner,

v.

KATHLEEN M. WINN, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of *Amici Curiae* National School Boards Association, Arizona School Boards Association, American Association of School Administrators, National Education Association, and Arizona Education Association In Support of Respondents

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae are a group of associations dedicated to the improvement of public education in America. *Amici* also have a longstanding interest in implementing effective state and local educational policies in accordance with constitutional requirements, including the Establishment Clause.

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the board of education of the U.S. Virgin Islands. NSBA represents over 95,000 of the Nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students—which is approximately 90 percent of the elementary and secondary students in the nation.

The Arizona School Boards Association ("ASBA") is one of the state members of NSBA. It is a non-profit corporation providing assistance to the more than 240 Arizona school boards that are its

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[1] Pursuant to Sup. Ct. R. 37.3(a) counsel for *amici* states that the parties have consented to the filing of this brief. Pursuant to Sup. Ct. R. 37.6, counsel for *amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

members. ASBA serves 95 percent of Arizona's public school districts, and those districts serve over 1.12 million children.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children.

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the majority of whom are employed as teachers by public school districts, colleges, and universities.

The Arizona Education Association ("AEA") represents more than 30,000 public school educators and education support professionals throughout Arizona. AEA members include teachers, counselors, speech pathologists, and student teachers.

NSBA and the other *amici* regularly represent their members' interests before Congress and federal and state courts and each has participated as *amicus curiae* in cases before this Court involving issues of importance to educators. *See, e.g., Fitzgerald* v. *Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009);

Forest Grove Sch. Dist. v. *T.A.*, 129 S. Ct. 2484 (2009); *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Morse* v. *Frederick*, 551 U.S. 393 (2007); *Arlington Cent. Sch. Dist. Board of Educ.* v. *Murphy*, 548 U.S. 291 (2006); *Schaffer* v. *Weast*, 546 U.S. 49 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Board of Educ. of Okla. City Pub. Sch.* v. *Dowell*, 498 U.S. 237 (1991).

The *amici* are concerned about the Arizona tuition tax credit program (the "Arizona program") because it undermines both important Establishment Clause principles and public education in Arizona. The harm this program does to public education and the degree to which it violates the Constitution go far beyond voucher programs of the type narrowly approved by this Court in *Zelman*, 536 U.S. 639. Indeed, the program is in many respects far worse than other voucher and tuition tax credit plans adopted by other states since *Zelman*.

Amici strongly believe that any educational voucher or tax credit program must, at a minimum, be religiously neutral. Like the program approved in *Zelman*, it must not have the purpose or effect of advancing religion, but rather must serve an important educational purpose. Second, it must provide public financial support to religiously-affiliated schools only through genuine and

independent parental choice. The Arizona system meets neither of these minimum criteria.

INTRODUCTION

This Court has long recognized "the importance of [public] education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982). "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all" and "has a fundamental role in maintaining the fabric of our society." *Id.*

The vast majority of students in America—and in Arizona—are educated in public schools. More than one million K-12 students attend public schools in Arizona. Less than 10 percent of that number, somewhere between 50,000-75,000 students, attend private schools. Less than 30,000 of those private school students participate in the State-funded, private-school scholarship program at issue in this case.

In recent decades, a number of school reform efforts across the country have sought to improve education, including public education, by fostering open competition between public and private schools. Whatever the merit or effectiveness of such school choice plans, the Arizona program at issue here simply is not one of them.

Some of the school choice plans implemented in recent decades have raised Establishment Clause concerns because they allow for the participation of religiously affiliated schools along with secular private and public schools. In *Zelman*, 536 U.S. 639 (2002), this Court addressed these issues and decided that not all such programs violate the Establishment Clause. As a result, the Court upheld a school choice plan that awarded vouchers to low-income parents of children in failing inner-city schools.

Zelman, however, also established the minimum criteria that such a plan must meet to be consistent with the Establishment Clause. The Arizona program does not come close to satisfying these criteria. Unlike some other school choice programs, the Arizona program does not provide free choice among public, secular private and religiously-affiliated schools, and does not assist low income or educationally disadvantaged students. Moreover, the program skews program benefits toward private, religious schools by allowing religiously-affiliated STOs and schools to discriminate on the basis of religion. The effect of the Arizona program, in turn, is to benefit religious STOs and religious schools and harm public education.

For these reasons, and as discussed more fully below, the Arizona program violates the Establishment Clause, and the decision below should be affirmed

SUMMARY OF ARGUMENT

The Arizona program serves no important educational purpose. The program's ostensible secular educational purpose—increasing choice—is a sham. The program does not target low-income students, at-risk students, or students in low-performing public schools. Indeed, most of the students participating in the program *already attended* private schools before receiving scholarships. In addition, most interested students in public schools cannot participate because the scholarships are too small to give public-school parents the financial support necessary to transfer their child to a private school. More importantly, participation may be made contingent not only on a student's willingness to attend a religious school, but also on adherence to the beliefs that school seeks to inculcate.

Under the minimum standards set forth by this Court in *Zelman*, the Arizona program is strongly skewed toward religious schools and thus violates the Establishment Clause for several reasons. To begin with, parents do not have a genuine opportunity to choose the school at which the aid distributed under the program is spent. Indeed, public schools are not even among the choices offered. Second, under the program, STOs may—and many openly do—select both schools and scholarship recipients based on religious criteria. Finally,

schools, as well, can deny admission to scholarship recipients on the basis of religion.

As a result, the Arizona program has the primary effect not of increasing choice, but of advancing religion. The program has not had the effect of increasing access to private schools; its main outcomes have been to publicly fund religiously affiliated STOs and religious schools, and to reduce the tuition bills of parents most of whom *already have chosen* to send their child to a religious school.

At the same time, the program harms public education in Arizona. It directly siphons off a growing amount of State tax revenue, bolstering the funding for—and driving up the tuition of—private schools, at the same time that Arizona cuts funding for its public schools.

Therefore, the decision below should be affirmed, and Respondents should be allowed to try their case. *Zelman* should not be expanded to protect the Arizona program. Rather, the Court should reaffirm the minimum requirements of *Zelman*. This will preserve important Establishment Clause principles and improve education in Arizona. It also will not undermine efforts to improve education through appropriate and constitutional school choice measures in Arizona or in other states.

ARGUMENT

The Arizona program violates the longstanding principle that the government "cannot consistently with the Establishment Clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches tenets and faith of any church." *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 16 (1947). It also conflicts with this Court's long and sustained recognition of the importance of public education. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

In *Zelman* this Court addressed one of a growing number of school choice plans that have been designed in part to supplement public schools' efforts to educate a broad spectrum of students and to improve these schools through healthy competition. *Zelman* reiterated the general principle that public funding of religious instruction is prohibited, and concluded that a plan could satisfy the Establishment Clause only if the program served an important secular purpose, was religiously neutral, and authorized the government aid to be distributed according to the free choice of parents about what schools their children should attend. 536 U.S. at 652.

None of the *Zelman* factors is present here. The Arizona program does not serve any important educational purpose. It does not give parents genuine free choice. And it is not religiously neutral.

To the contrary, the program has the dual ill effects of promoting religiously affiliated schools and undermining public education.

I. ARIZONA'S TUITION TAX CREDIT PROGRAM SERVES NO IMPORTANT EDUCATIONAL PURPOSE.

The Arizona program purportedly was designed to "provid[e] access to a broad array of educational choices by defraying parents' educational costs." Pet. Br. 10. It obviously fails to do this. The program does not provide genuine, independent choice to parents, and it does not enhance access to private schools for low-income or disadvantaged families.

To the contrary, the Arizona program lacks the basic features shared by plans that this Court previously has found acceptable and by other school choice plans adopted in other states since *Zelman*. The Arizona program thus is transparently an "ingenious plan[] for channeling state aid to sectarian schools," *see Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973), and its ostensible secular purpose is "a sham, * * * merely secondary to [its] religious objective." *See McCreary Cnty. v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 862 (2005) (secular purpose inquiry is not a "pushover, and any claimed secular purpose is not adequate").

A. The Arizona Program Is Not a True School Choice Plan.

The Arizona program does not provide true school choice. As explained hereinafter and in Respondents' brief, the Arizona program categorically excludes public schools and bears none of the other hallmarks of "true choice" emphasized in this Court's previous decisions. Even worse, it expressly allows STOs and religious schools to practice religious discrimination. *See* Parts II.B-C *infra*; *see also Zelman*, 536 U.S. at 655; *Mueller v. Allen*, 463 U.S. 388, 391 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993).

In contrast, most other school choice plans adopted since this Court's decision in *Zelman* allow much broader parental choice. For example, Florida's Tax Credit Scholarship program does not permit its three, secular STOs to "restrict or reserve scholarships for use at a particular private school." Fla. Stat. Ann. § 1002.395(6)(g) (West 2010). Rhode Island's Business Entity Scholarship Tax prohibits taxpayers from designating their donations toward a particular school. *See* R.I. Gen. Laws Ann. § 44-62-2 (West 2009), *amended by* 2010 R.I. Pub. Laws 10-239. And, under Iowa's scholarship program, STOs must permit students "to attend a qualified school of

their parents' choice." Iowa Code Ann. § 422.11S (West 2010) (emphasis added). *See Zelman*, 536 U.S. at 646 ("[w]here tuition aid is spent depends *solely* upon where parents who receive tuition aid choose to enroll their child") (emphasis added).

B. The Arizona Program Does Not Increase Educational Options for Students.

The Arizona program also does not increase educational options for students by improving access to private schools for the State's neediest families. If, as its proponents claim, the Arizona program were actually designed to "provid[e] access to a broad array of educational choices," Pet. Br. 10, the program would target—and its implementation would benefit—those students who have the fewest educational choices available to them or at least those who do not already have the option of attending a private school. The Arizona program does not. Neither low-income families nor at-risk students benefit from the program.

Only seven out of 55 STOs use financial need as a primary factor in determining which students receive scholarships. *See Tax Credit Sponsor's Vision Unrealized*, East Valley Tribune, June 15, 2010, http://www.eastvalleytribune.com/special_reports/rigged_privilege/article_2caa9671-aaad-5992-9d46-2594a9ee6b3c.html. Nor does the program require STOs to consider the quality of students' public

school options or give any special consideration to students with physical, mental and emotional challenges, or limited English proficiency.[2] *See* Ariz. Rev. Stat. Ann. § 43-1089.

Moreover, because the program does not specify the size of the scholarships that must be awarded, the scholarships tend to be too small to cover a student's tuition at most private schools, effectively excluding most low-income students. Scholarship sizes have ranged from an average of $554 in 1998 to an average of $1,889 in 2009. *See* Arizona Department of Revenue, Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009 (Apr. 21, 2010) [hereinafter "2009 Ariz. Dep't of Revenue Report of Donations to STOs"]. Yet tuition at Arizona's private schools can range from $5,000 to $20,000. *See* Ronald J. Hansen & Pat Kossan, *Tuition Aid*

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[2] As explained in Respondents' Supplemental Brief Regarding a Change in State Law, in April and May 2010, Arizona enacted two statutes (S.B. 1274 and H.B. 2664) that amend the Tuition Tax Credit program. The amendments, effective July 1, 2011, require STOs to take students' financial need into account when awarding scholarships. Merely *considering* financial need, however, does not in any way guarantee that scholarships will be *awarded* on the basis of need. Moreover, because the program still permits religious discrimination, the mere consideration of need does not alter the program's real purpose to provide public funds to religious schools.

Continues to Elude Needy, Ariz. Republic, Dec. 13, 2009, http://www.azcentral.com/news/articles/2009/12/13/20091213sto outreach1213.html. Moreover, the availability of scholarships under the Arizona program has actually encouraged private schools to *increase* their tuition. *See Schools Teach Parents How to Skirt the Law*, East Valley Tribune, June 15, 2010, http://www.eastvalleytribune.com/special_reports/rigged_privilege/article_db4088f9-5789-5a1d-abed-9af2a5a39ef2.html.

Thus, rather than benefiting students in need, the Arizona program ironically has driven up the cost of private schools, making them less accessible to low-income families. The foreseeable result has been that the majority of students who have received scholarships under the Arizona program have been from middle class or wealthy families. *See* Carrie Lukas, Goldwater Inst. Policy Report No. 186, The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students (Dec. 11, 2003).

The Arizona program is a far cry from the plan at issue in *Zelman*. Most school choice plans at least attempt to marshal the power of genuine parental choice to promote educational reform and increase opportunity for needy students. In fact, most of these other plans are wholly focused on improving the educational opportunities of low-income or at-risk students.

Compare *Zelman*, itself, for example. The Ohio voucher plan challenged there was designed to give students an alternative to struggling public schools. The plan targeted students in the Cleveland School District at a time when only 10 percent of students were performing at basic proficiency, and fewer than one-third of students were graduating from high school. *See Zelman*, 536 U.S. at 644. The Ohio plan also distributed aid to parents according to their financial need. Families with incomes below 200 percent of the poverty line were given priority access to vouchers and could receive up to 90 percent of private school tuition (up to $2,250); private schools were prohibited from charging these parents a copayment greater than $250. Relatively wealthier families could receive up to 75 percent of private school tuition. As a result, when *Zelman* was decided, 60 percent of the students participating in the Ohio plan were from families at or below the poverty line. *See id.* at 646.

Five other states that have enacted tuition tax credit programs (Florida, Georgia, Iowa, Pennsylvania, and Rhode Island) all similarly include provisions targeting low-income students or requiring that scholarship recipients be currently enrolled in a public school.[3] Florida's Tax Credit

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[3] *See* Fla. Stat. Ann. § 1002.395 (West 2010); Ga. Code Ann. §§ 20-2A-1, 48-7-29.16 (West 2010); Iowa Code Ann. § 422.11S;

Scholarship, for example, awards scholarships up to $4,106. *See* Florida Department of Education, Florida Tax Credit Scholarship Program FAQs, http://www.floridaschoolchoice.org/information/ctc/faqs.asp.

The Arizona program creates no such opportunities for low-income students to attend private schools. And, it lacks basic features to ensure genuine, independent parental choice. These characteristics distinguish it—and far from favorably—from other school choice programs. These failures in the Arizona program's design and implementation also suggest that the program is not actually intended to promote school reform; rather, its primary purpose is to provide public resources to private, mostly religious schools and the students already attending them.[4]

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72 Pa. Cons. Stat. Ann. § 8701-F *et seq.* (West 2010); R.I. Gen. Laws Ann. § 44-62-2, *amended by* 2010 R.I. Pub. Laws 10-239.

[4] A program genuinely designed to expand high-quality educational options also presumably would impose public accountability, oversight, and at least some curricular control on any school—public or private—that received public funding. After all, where public tax dollars are involved, the public has an interest in ensuring quality education is delivered. The Arizona program contains no such measures.

II. THE ARIZONA PROGRAM VIOLATES *ZELMAN*.

When the *Zelman* Court held that the Ohio school choice plan passed constitutional muster, it made clear that in order for other such plans to satisfy the Establishment Clause they must provide "genuine and independent choice[]" to a broad class of parents and must be religiously neutral. *Zelman*, 536 U.S. at 649. The *amici* agree that these minimum criteria are necessary, both under the Establishment Clause and to ensure that choice plans are effective tools of educational improvement. The Arizona program does not satisfy the minimum criteria set forth in *Zelman*.

A state-funded scholarship program, like Arizona's, that totally excludes public schools does not give parents a genuine choice and is skewed against public education. Moreover, a program, like Arizona's, that permits scholarships to be restricted to certain sectarian schools is not religiously neutral and cannot be squared with the program's unassailable goal of improving public education through competition. Worst of all, a program, like Arizona's, that allows schools to deny students admission on the basis of their religion countenances one of the principal harms—state-sponsored religious preference—that the Establishment Clause was designed to prevent.

A. The Arizona Program Provides No Public School Option.

Although the merit of any school choice plan that funnels state funds to religious schools is debatable, without question such a plan must include public schools within the choices that it offers to parents. If the only choices offered under a "school choice" plan are private, mostly religious schools, parents inevitably will choose private, mostly religious schools. Such a stacked "choice" does not foster competition or expand educational opportunities; it provides a direct government subsidy to private schools and confers a financial benefit to a narrow class of individuals predisposed to religious education in the first place. This is exactly what has happened in Arizona. *See infra* Section III.[5]

Under this Court's decisions, it is settled law that for a school choice plan to satisfy the Establishment

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[5] Nor do taxpayers have a truly free choice under the Arizona program. STOs can only provide scholarships to private schools. Therefore, the program's tax credit is not available to citizens who want to provide similar supplemental resources to public schools. For example, as in many states, Arizona law allows students to transfer between public schools districts, with the families bearing the cost of tuition. The Arizona program, however, does not permit STOs to award scholarships for tuition at a public school, and thus effectively prevents citizens from providing supplemental support to families that want greater choice over which public school their child can attend.

Clause, it must give parents the option to use program benefits at public as well as private schools. This Court four times has approved state programs that direct aid to religious schools through the choices of parents or students, and each time the Court has emphasized that an essential requirement insulating the program from an Establishment Clause violation is that parents had the choice of using program aid at public and private schools.[6] The only time that the Court has squarely addressed a choice plan preventing parents from using the benefits at public schools, the Court struck it down—largely because the exclusion of public schools skewed the incentives toward religious schools. *See Nyquist*, 413 U.S. 756

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[6] *See Mueller*, 463 U.S. 388, 391 (inclusion of both public and private schools in a Minnesota tax deduction program was one of the "most important[]" factors "argu[ing] . . . strongly for the provision's constitutionality"); *Witters*, 474 U.S. at 488 (upholding aid program because "aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education," which "creates no financial incentive for students to undertake sectarian education"); *Zobrest*, 509 U.S. at 10 (approving the use of funds under the Individuals with Disabilities Education Act ("IDEA") in a Catholic school because it "distributes benefits neutrally . . . without regard to the 'sectarian-nonsectarian, or public-nonpublic' nature of the school the child attends"); *Zelman*, 536 U.S. at 648–50. *Cf. Nyquist*, 413 U.S. at 782 n.38 (emphasizing importance for Establishment Clause purposes of the benefit "includ[ing] all schoolchildren, those in public as well as those in private schools").

Zelman emphasized the constitutional significance of including public schools in the parents' choice. The Ohio plan provided "two basic kinds of assistance": "[T]uition and aid for students * * * to attend a participating public or private school of their parent's choosing" and "tutorial aid for students who choose to remain enrolled in public school." 536 U.S. at 645. That in theory any parent—whether the parent wanted to send their child to public or private school—could take advantage of the program was a crucial factor in the majority's determination that the Ohio plan satisfied the Establishment Clause. As the Court explained, the "program challenged here is a program of true private choice" because "[t]he program permits the participation of *all* schools within the district, religious or nonreligious" and is available to "any parent of a school-age child who resides in the Cleveland City School District." *Id.* at 653.

In contrast to the plan in *Zelman*, the Arizona program prohibits parents from using program funds at public schools. Under the Arizona program, taxpayers make 100-percent tax-refundable contributions to STOs, which then provide scholarships to students at nonpublic schools. *See* Ariz. Rev. Stat. Ann. § 43-1089(H)(2)-(3) (West 2010). As a result, the Arizona program does not include "the participation of *all* schools" in the State and is not available to "any parent of a school-age child who resides" in Arizona. *Zelman*, 536 U.S. at 653.

By limiting its benefits to private, mostly religious schools, the Arizona program is much more similar to two New York programs that this Court struck down in *Nyquist* than to the plan approved in *Zelman*. Where New York limited tuition grants and tax benefits only to students attending non-public schools, the Court concluded that the law's function was "to provide assistance to private schools, the great majority of which [85 percent] are sectarian." *Nyquist*, 413 U.S. at 783. As a result, the programs violated the Establishment Clause because "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian [schools]." *Id.* at 783.

Like the plan struck down in *Nyquist*, the "[s]pecial tax benefits" conferred on religious schools by the Arizona program "cannot be squared with the principle of neutrality established by decisions of this Court." *Id.* at 793. In Arizona, program benefits only can be used in nonpublic schools, the vast majority of such schools are sectarian,[7] and almost all of the program benefits flow to religious schools.[8]

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[7] Forty-six percent of Arizona public schools are Christian (non Catholic), 28 percent are Catholic, 25 percent have no religious affiliation, and 1 percent are Jewish. *See* Vicki Murray, Goldwater Inst. Report No. 199, Survey of Arizona Private Schools: Tuition, Testing and Curricula (2005).

[8] Nor are the problems with the Arizona program remedied simply because Arizona maintains a public education system.

B. The Arizona Program Skews Parents' Choice of Private Schools Toward Religious Schools.

In addition to excluding public schools, the Arizona program further skews its benefits toward religious schools and undermines any potential educational benefits of the program by permitting STOs to select participating schools on the basis of religion. This defect further limits "the narrowness of the benefited class," makes the Arizona program more likely to create "divisiveness" rather than fair competition, and excludes the majority of parents and students in Arizona who have no desire to choose a religious education. *See Nyquist*, 413 U.S. at 794.

The statutory provision authorizing the Arizona program prohibits STOs from "limiting availability [of scholarships and aid] to only students of one school," Ariz. Rev. Stat. Ann. § 43-1089(H)(3), but it

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Public education is compulsory and available to everyone. As a result, the existence of the public school system is not relevant to the constitutional analysis of a program that does not include public schools within its benefits. *See Nyquist*, 413 U.S. at 782 n.38 ("The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools 'totally at state expense.'"). *Zelman* is not to the contrary. *Zelman* addressed the many options available to Cleveland parents in the context of a program that gave parents "genuine and independent" choice to use program benefits at a public or private school, a factor that is non-existent in Arizona. 536 U.S. at 653-56.

does not prohibit them from limiting scholarships to a class of schools selected on religious grounds. STOs *could* have been required to provide benefits to students at all schools, but Arizona has not applied the program in that way. In practice, Arizona awards tax credits for contributions to many STOs that limit scholarship awards to a small number of schools of a particular type, often defined by religious affiliation. *See Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1006 (9th Cir. 2009).[9]

As a result, those students fortunate enough to get a scholarship under the Arizona program may have no option other than a religiously-affiliated school that may use those scholarship funds to teach

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[9] For example, the largest STO as of 2009, the Arizona Christian School Tuition Organization, Inc. (hereinafter the "Arizona Christian STO"), only awards scholarships to "Arizona Christian schools." Arizona Christian School Tuition Organization, Inc., http://www.acsto.org ("Since it began in 1998, ACSTO has awarded scholarships to more than 18,000 students attending 150 Arizona Christian schools."). Likewise, the Catholic Tuition Organization of the Diocese of Phoenix (the "Catholic Tuition Organization"), the second-largest STO as of 2009, only grants scholarships to "participating schools [that] are Catholic schools located in the Diocese of Phoenix, which integrate faith throughout an educational process that promotes academic excellence, moral values and lifelong service." *See* Catholic Tuition Organization, Participating Schools, http://www.catholictuition.org/schools.aspx.

its own religious beliefs. Such an option—whether to accept publicly-funded religious indoctrination or forego a government benefit altogether—is not a genuine, religiously neutral choice by any stretch of the imagination.

In *Bowen v. Kendrick*, this Court made clear that a government program is unconstitutional if, in its application, public aid is directed to religious organizations that are "pervasively sectarian" or that use the public funds to "inculcate the views of a particular religious faith." 487 U.S. 589, 621 (1988). By permitting STOs to award scholarships only to religious schools and to require that scholarship recipients attend those schools, the Arizona program fails this test.

In fact, the Arizona program restricts parental choice even further, as taxpayers that fund the STOs have the real power of choice under the law. For example, under the Arizona program, taxpayers may designate scholarship funds for a particular student and apparently may require that the student attend a particular school. *See* Catholic Tuition Organization, http://www.catholictuition.org/faq.aspx#funddistribution ("[C]ontributors can designate their money to go to the students at a particular school."). This practice often leaves parents that want to seek a scholarship no choice at all.

At a minimum, a genuine school choice program must allow parents an unfettered opportunity to select the schools that their children will attend with the children's best interests in mind. Limiting parents' choice based on the religious views of certain taxpayers is not only contrary to the Establishment Clause, it is bad educational policy.

C. The Arizona Program Allows Schools To Deny Students Admission Because of Their Religious Beliefs.

The Arizona program also allows participating schools to discriminate against students on the basis of religion. *See* Ariz. Rev. Stat. Ann. § 43-1089(H)(2) (prohibiting only discrimination "on the basis of race, color, handicap, familial status or national origin"). This means that even a parent who wants his or her child to be educated in a religious school may not be able to use the scholarship if his or her child does not meet the religious criteria of a school's admissions policy. But a publicly funded program that permits exclusion from its benefits solely on the basis of religious criteria is plainly prohibited by the Establishment Clause.

The religious discrimination permitted by the Arizona program is in sharp contrast to the non-discrimination requirements of the plan upheld in *Zelman*. The Court found that the Ohio program provided parents a genuine and independent secular

choice in part because it broadly prohibited all discrimination, including religious discrimination, by participating schools. *Zelman*, 536 at 645 ("Participating private schools must agree not to discriminate on the basis of race, *religion*, or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or *religion*.'") (emphasis added). Whereas the Ohio program prohibited discrimination on the grounds of religious belief and provided other crucial safeguards to ensure that program funds were not used to advance religion (for example, allowing parents to choose a public school), the Arizona program, by omission, permits both.

On a more fundamental level, the Arizona program's authorization of religious discrimination undermines the purposes and goals of publicly funded education, which is designed to be inclusive and to provide an education for all citizens regardless of background, beliefs or circumstances. By allowing religious discrimination, the Arizona program places the State's "prestige, coercive authority, [and] resources behind * * * religious belief * * * compelling non-adherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community." *See Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989). This Court should not endorse a program—like Arizona's—that so

plainly violates the Establishment Clause and undermines the foundations of public education.

III. THE ARIZONA PROGRAM HAS THE EFFECT OF ADVANCING RELIGION

As a direct result of the Arizona program's limitations on parental choice, the benefits of the Arizona program primarily have inured to religiously affiliated STOs, sectarian schools, and parents whose children already attend religious schools. Thus, the "effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Nyquist*, 413 U.S. at 783.

First, the Arizona program has benefited primarily religiously affiliated STOs. In the program's first year of operation in 1998, more than 90 percent of the $1.8 million in tax credit funds were contributed to STOs that limited scholarship awards to students attending specific religious schools. In 2003 and 2004, respectively, approximately 82 percent and 79 percent of scholarships were awarded by STOs that restricted scholarships to religious schools.

This early trend has continued. An analysis by The Arizona Republic found that, in 2008, 93 percent of the $54 million in tax credits were directed toward religiously affiliated STOs. *See* Ronald J. Hansen & Pat Kossan, *Tuition aid Program Benefits Wealthy Families, Raises Concerns*, Ariz. Republic, Aug. 1, 2009,

http://www.azcentral.com/arizonarepublic/news/articles/2009/08/01/20090801sto-whobenefits0801.html. And currently, four of the largest STOs are religious organizations (Arizona Christian STO, Catholic Tuition Organization of the Diocese of Phoenix, Catholic Tuition Organization of the Diocese of Tucson, and the Jewish Tuition Organization). In 2009, these four STOs received more than half of the $50,853,086 contributed to the program by Arizona's taxpayers.[10]

Second, the State's private, primarily religious schools directly benefit from the program as well. As of 2005, 75 percent of Arizona's private schools were religiously affiliated. Because the program does not prohibit STOs from discriminating on the basis of religion, *see* Ariz. Rev. Stat. Ann. § 43-1089, these private, religious schools receive the vast majority of the taxpayer funds donated to the State's largely religious STOs. As of 2009, only 15 percent of scholarship money was available for use at secular schools. *See Winn v. Ariz. Christian Tuition Org.*, 586 F.3d 649, 650 (9th Cir. 2009) (concurring op.). In

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[10] The Arizona Christian STO awarded $10,807,320 in awards to religious schools, the Catholic Tuition Organization of the Diocese of Phoenix awarded $9,377,207 in awards to religious schools, and the Catholic Tuition Support Organization for the Diocese of Tucson awarded $4,330,366 in awards to religious schools. *See* 2009 Ariz. Dep't of Revenue Report of Donations to STOs.

fact, the availability of scholarships under the Arizona program actually has provided a windfall to the religious schools who participate, encouraging them to increase their tuition rather than open their doors to more students. *See Schools Teach Parents How to Skirt Law*, East Valley Tribune, June 15, 2010, http://www.eastvalleytribune.com/special_reports/rigged_privilege/article_db4088f9-5789-5a1d-abed-9af2a5a39cf2.html.

Finally, most of the scholarships go to a small group of individuals who already attend the private, mostly religious schools.[11] For example, as of 2005, more than three-fourths of the scholarship dollars awarded had gone to students who were enrolled in private school when the statute was enacted. *See* Deborah Katz Levi, *Tuition Tax Credit Proposals in Utah—Their Constitutionality and Feasibility*, 2005 Utah L. Rev. 1047, 1075-76 (2005).

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[11] In 2007-2008, only 4.5 percent of Arizona students attended private schools. *See* National Center for Education Statistics, *Enrollment in Public Elementary and Secondary Schools, by State or Jurisdiction*, http://nces.ed.gov/programs/digest/d09/tables/dt09_034.asp; and National Center for Education Statistics, *Characteristics of Private Schools in the US*, 2009 http://nces.ed.gov/pubs2009/2009313.pdf. Thus, program funds are available to only a very small percentage of Arizona's students.

At every level, the primary effects of the program are to direct funds to support religious education. Most tax-credit donations go to religiously affiliated STOs, which were created under the program to support religious education. Because STOs are allowed to practice religious discrimination in selecting which schools scholarship recipients can attend, most of the scholarships benefit religious schools, which themselves are not prohibited from discriminating on the basis of religion. And the scholarships are ending up largely in the hands of private individuals who already have chosen a private, and in most cases, religious education for their children.

Rather than providing competition and improving public education, therefore, the Arizona program advances the religious mission of participating schools. This result is inconsistent with both the Establishment Clause and any sound notion of educational reform or school improvement.

IV. THE ARIZONA PROGRAM HARMS PUBLIC EDUCATION

This Court has consistently acknowledged the critical role that public education plays within the states and in American society as a whole. In *Brown v. Board of Education*, for example, the Court emphasized the importance of education as a function of state and local governments and as a public responsibility that serves the public good. 347

U.S. at 493 ("Today, education is perhaps the most important function of state and local governments * * *. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.").[12]

Undermining this commitment, the Arizona program diverts funding from the State's public schools. As a result, the program directly harms public education in at least three respects. It also threatens the number and quality of public school options in Arizona, the only viable choices for the overwhelming majority of the State's students.

First, the program's tax credits divert public funds from the State treasury (where those dollars could support public schools) to STOs, which use those dollars to support the private—in most cases, religious—schools of their choice. Since the program's inception in 1997, the state treasury has diverted a total of $350 million to mostly religious STOs. *See Private School Tax Credits Rife with Abuse*, East Valley Tribune, July 31, 2009, http://www.eastvalleytribune.com/special_reports/rig

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[12] *See also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("[Public] education must prepare pupils for citizenship in the Republic.") (internal quotation marks and citation omitted); *Plyler*, 457 U.S. at 221 ("In sum, education has a fundamental role in maintaining the fabric of our society.").

ged_privilege/article_7debd2e5-d000-5aed-b813-a0d252377755.html. In 2009, alone, Arizona taxpayers directed $50,853,086 would-be state tax dollars to STOs.[13] The STOs, in turn, distributed that substantial sum in the form of scholarships to just 27,658 Arizona children attending private schools, while the 1,012,068 Arizona children enrolled in public schools—who have had their funding slashed—received none of it. *See* 2009 Ariz. Dep't of Revenue Report of Donations to STOs.

Second, the Arizona program provides no support for academic programs at public schools. Of the $350 million that has been diverted from the State treasury since 1997—the majority of which has gone to religiously affiliated schools—not a single dollar has been devoted to supporting Arizona's public schools. *See id.*

Third, the Arizona program does not give families the option of using program funds within the public school system (for tutoring, transfer costs, transportation or other services, for example). Thus, the program encourages some students to leave the public school system for private schools, taking their per-pupil funding with them. As of 2008, the

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[13] In *Nyquist*, this Court acknowledged that a tax credit, as a diversion of funds from the state treasury, constitutes a "'charge made upon the state.'" 413 U.S. at 791 (citation omitted).

average per pupil total allocation for public schools in Arizona was $9,305 (including funding from federal, state, and local sources), so every time a student transfers to a private school, the public schools lose that amount. *See* U.S. Census Bureau, 2008 Annual Survey of Local Government Finances—School Systems.

On the other hand, since few students transfer out of public schools to use scholarships from STOs under the program, the State does not save nearly enough money to offset the revenue lost through the program. For example, a report by the Iowa Department of Revenue analyzing the financial implications of Iowa's tuition tax credit program—which is similar at least to the extent that it permits taxpayers to divert funding from the state treasury to a tuition program—found that the tax credits have been a significant "drain" on that state's treasury. The number of students in Iowa transferring out of the public schools has not been nearly high enough to offset the cost of the program. *See* Jim Malewitz & Joyce Russell, IowaWatch, *Back to School Special: Huge Tax Break for Private Schools Strains State Treasury*, Aug. 13, 2010, http://www.iowawatch.org/?p=1065.

By diverting millions of dollars that could be used in public schools to private schools, the program constitutes a severe threat to the quality of public education programs. The impact of this diversion in funding is amplified in Arizona where public schools

have been underfunded for years, and the recession has recently forced further reductions in public education funding. Each year between 2005 and 2008 (the latest year for which data are available), Arizona's total per-pupil funding ranked somewhere between 44th and 48th lowest among the 50 states and the District of Columbia.[14] *See* U.S. Census Bureau, 2008 Annual Survey, *supra*. For the 2010-11 school year, the Arizona legislature cut funding for public schools even further—by $400 million. *See* Don Harris, *Sounding the Alarms: Arizona Schools Feeling Budget Pinch*, Ariz. Capitol Times, July 23, 2010.

The impact of these cuts during the 2010-11 school year is dramatic. For example, Arizona's public schools: (1) cut pre-school programs for 4,328 children; (2) lost half of the prior year's State funding for kindergarten; (3) eliminated programs for disadvantaged children in preschool through third grade; (4) reduced financial aid to charter schools; and (5) slashed funding for books, computers, and other supplies.[15] *See* Nicholas Johnson, et al., Center

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[14] Each year between 2005 and 2008 (the latest year for which data is available), Arizona's per-pupil funding from state sources ranked somewhere between 40th and 44th lowest among the 50 states and the District of Columbia. *Id.*

[15] Arizona is not alone. Thirty-two other states and the District of Columbia have been forced to adopt similar budget

on Budget and Policy Priorities, *An Update on State Budget Cuts*, (last updated Aug. 4, 2010), http://www.cbpp.org/cms/?fa=view&id=1214. School districts have also been forced to layoff teachers, increase class size, and cut back on music, physical education, and art. *See* Harris, *supra*.

These cuts in Arizona's already relatively low public education budget inevitably leave most of Arizona's parents with fewer educational options from which to choose. They also mean that the students who remain in Arizona's public schools—either by choice or because there is no scholarship available to them—are likely receiving a lower-quality public education.

The Arizona program again is an outlier among school choice plans in the amount of money that it diverts from public education to private institutions. Many other voucher or tax benefit programs—including the Ohio voucher plan and the Minnesota tax deduction program upheld by this Court—include some financial aid to public schools in recognition of the vital role of public education in a program of true private choice.

Under the Ohio program upheld in *Zelman*, parents can choose to use program aid to enroll their

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cuts within their public education systems in response to the economic recession. *See* Johnson, *supra*.

child in a participating private school, to transfer their child to a public school in an adjacent district, or to have their child receive tutorial services while remaining in his or her public school. *See Zelman*, 536 U.S. at 645. The Ohio program also includes a financial disincentive to choose a private school in that parents who choose to send their children to private school receive only half the assistance given to parents who choose to keep their children in a public school. *See id.* at 654. Likewise, in the Minnesota program upheld in *Mueller*, parents could deduct their children's educational expenses whether their child attended private or public schools. *See* 463 U.S. at 395.

Pennsylvania's Educational Improvement Tax Credit ("EITC") program also contains provisions that support public schools. Under the EITC program, corporations may receive tax credits for donating money to scholarship organizations or "educational improvement organizations." The scholarship organizations award scholarships to enable students to attend the private or public school of their choice, and the educational improvement organizations distribute grants to improve innovation in public school programs. *See* 72 Pa. Cons. Stat. Ann. 8701-F *et seq.* Similarly, under Florida's Tax Credit Scholarship program, students receive scholarships to attend a private school or to enroll in a public school in another district. *See* Fla. Stat. Ann. § 1002.395.

The Arizona program's failure to provide any support to the State's public schools is further evidence that true school reform is not the program's goal. This failure and the program's continued diversion of public funds away from the State treasury also constitute a grave threat to Arizona's public schools.

CONCLUSION

For the foregoing reasons and for those in Respondents' brief, the Ninth Circuit's decision should be affirmed.

Respectfully submitted,

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September 22, 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
AUG 5 - 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-988, 09-991

In the

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.

Petitioners,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Arizona Revised Statute (A.R.S.) section 43-1089 (Section 1089) is a facially neutral program of private choice in education. Most taxpayers who contribute to school tuition organizations under Section 1089 contribute to organizations that award scholarships to students attending religious schools. Did the Court of Appeals err in holding that Section 1089 has the purpose and effect of advancing religion in violation of the Establishment Clause, when the State does nothing to influence the taxpayers' or the school tuition organizations' choice?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners.[1]

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, and Hawaii. PLF has participated as amicus in many cases involving kindergarten through 12th grade (K-12) education reform including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Wells v. One2One Learning Found.*, 141 P.3d 225 (Cal. 2006); and *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999).

This case raises important issues of constitutional law as well as important policy considerations in the realm of K-12 education. Amicus believes that its

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Eight years ago in *Zelman* this Court held a school choice program constitutional where the state gave tuition aid directly to parents that the parents could then use to cover tuition expenses at public or private schools. *Zelman*, 536 U.S. at 645-46, 663. The *Zelman* Court emphasized that the independent private choices of parents shielded the program from an Establishment Clause violation. *Id.* at 652. The existence of independent choice by nongovernment actors shows that the government is remaining neutral toward religion, and is not "respecting an establishment of religion" as prohibited by the First Amendment. U.S. Const. amend. I.

Ariz. Rev. Stat. § 43-1089 (Section 1089) provides for scholarships to students "to attend any qualified school of their parents' choice." Ariz. Rev. Stat. § 43-1089(H)(3). Unlike *Zelman*, however, the state does not give state funds directly to parents. Instead, Section 1089 creates a multi-faceted scheme whereby money can go to a sectarian school only if: (1) a Student Tuition Organization (STO) is created that independently chooses to provide scholarships to religious schools; (2) multiple taxpayers independently decide to donate a small ($500) amount to that STO in order to claim a tax credit; and (3) parents independently choose to apply for (and the STO grants) a scholarship for a student to attend a private, religious school. *See* Ariz. Rev. Stat. § 43-1089. Thus,

Section 1089 requires that numerous individuals make independent private choices before any donations (which are then claimed for tax credits) end up in sectarian schools. The independent choices here are significantly greater than were present in *Zelman*, and ensure that no one would consider that the State of Arizona directly funds religion.

While independent choice is fundamental to this Court's Establishment Clause jurisprudence, the freedom to choose also underscores the important policy implications of this Court's decision. All too often, government-run public schools provide a one-size-fits-all model to education. Conversely, school choice programs create incentives for schools to improve, and once choice is injected into state education systems, the positive results are dramatic. As a result of choice, programs throughout the country have improved student achievement and graduation rates almost universally. Moreover, school choice programs provide incentives for specialized schools that can care for those children most in need of increased attention and differentiated instruction. This is of particular importance in Arizona, where its state supreme court recently struck down a different school choice program designed to help the state's most needy children. *See Cain*, 202 P.3d 1178. In addition, school choice programs throughout the country save taxpayers millions of dollars. When schools compete for students, private schools in a competitive environment will spend more resources on instructional materials and less on bureaucracy. With states throughout the country facing severe budget deficits, the money saved from school choice programs cannot be discounted.

Section 1089 allows choice into Arizona schools. Throughout the country, where choice in education is present, parents, children, and taxpayers benefit. Section 1089 provides hope to thousands of Arizona families and this Court's decision will encourage other states to implement similar programs nationwide. Because Section 1089 requires independent choices from parents, taxpayers, and STOs before any money goes toward a religious school, it is neutral toward religion. This Court should therefore reverse the decision of the Court below.

ARGUMENT

I

SCHOOL CHOICE PROGRAMS THAT REQUIRE INDEPENDENT CHOICES BY NON GOVERNMENT ACTORS ARE NEUTRAL WITH RESPECT TO RELIGION

This Court has long recognized that the First Amendment requires the government to remain neutral toward religion.

> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Bd. of Educ. of the Twp. of Ewing, 330 U.S. 1, 18 (1947).

> [T]he [neutrality] principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any

> benefit provided religious groups or individuals in turning aside Establishment Clause challenges.

Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 704 (1994).

In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995), this Court noted that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Also, in *Agostini v. Felton*, 521 U.S. 203, 231 (1997), this Court emphasized that a program does not create a financial incentive to undertake religious education where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." And in *Mitchell*, a plurality of this Court observed that "we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." 530 U.S. at 809 (plurality opinion).

When determining whether programs are neutral toward religion, the presence of independent choice by nongovernmental actors makes programs more likely to have the requisite neutrality. Indeed, this Court routinely emphasizes the importance of independent choice when deciding Establishment Clause challenges. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) ("[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents,"); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) ("[P]ublic funds become available [to

sectarian schools] only as a result of numerous private choices of individual parents of school-age children."); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) ("[A]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.").

In *Mitchell*, both the plurality opinion and the concurring opinion stressed the importance of independent choice. Both opinions noted that governmental aid is permissible when, as the concurrence puts it, "the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (citing *Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 10). In these circumstances, "any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (citation omitted).

Much of the briefing in this case centers around the proper interpretation of *Zelman*, 536 U.S. 639. On the question of neutrality and choice, however, this Court was clear:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

> A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Zelman, 536 U.S. at 652.

The court below recognized the importance of independent private choice. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1015 (9th Cir. 2009). Yet, had the court below properly considered the interplay between neutrality and independent choice, Section 1089 would have survived constitutional scrutiny. Programs that require independent choices by nongovernment actors before any dollars can be accepted by a religious institution, satisfy the Establishment Clause's neutrality requirement. Indeed, what distinguishes this case from *Zelman* is the multiplicity of independent private choices that occur before a sectarian school provides a scholarship to any student. In his dissent to the denial of rehearing en banc, Judge O'Scannlain summarized the layers of choice inherent in Section 1089.

> Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide

> to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally, parents need to apply for a scholarship for their student.

Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 662 (9th Cir. 2009) (en banc) (O'Scannlain, J., dissenting).

The intent of Section 1089 was to provide "equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." *Winn*, 562 F.3d at 1012. Participation in Section 1089's scholarship program by both schools and school tuition organizations is based entirely on religiously neutral criteria. Ariz. Rev. Stat. § 43-1089(H)(2) & (3). No preference for religious schools is given; no preference for secular schools is given. *Id.*

Moreover, it is only through the "independent and private choices" of parents, school tuition organizations, and taxpayers that any government aid flows to a religious school. STOs decide what type of schools they want to support. Taxpayers decide which STOs they want to direct their money towards. Parents decide whether to apply for a scholarship from an STO. Because taxpayers and parents independently direct the flow of scholarships, public funds ultimately reach individual schools only as a result of the "genuinely independent and private choices" of multiple nongovernment actors. *See Zelman*, 536 U.S. at 651 (citing *Witters*, 474 U.S. at 487). This Court has consistently held that when "aid to parochial schools is available only as a result of decisions of individual parents 'no 'imprimatur of state approval,' can be deemed to have been conferred on any

particular religion, or on religion generally." *Mueller*, 463 U.S. at 399 (citing *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)); *see also Zelman*, 536 U.S. at 652.

Amicus believes that a school choice program that provides for the participation of all school children, allows taxpayers to fund the STO of their choice, and enables parents to apply to the STO of their choice, is entirely consistent with this Court's principles of neutrality and independent choice. Since this Court's landmark decision in *Zelman*, states across the country have been experimenting with different methods of increasing choice throughout their educational systems. The continued livelihood of many of these programs is dependent upon this Court's decision. This Court should reverse the court below, and reaffirm that the principles of neutrality and independent choice underscore its Establishment Clause jurisprudence.

II

WHEN CHOICE IS UNLEASHED IN EDUCATION, PARENTS, STUDENTS, AND TAXPAYERS REAP THE BENEFITS

Americans take advantage of choice every day, from which grocery store to patronize to which university to attend; those businesses strive to please their customers. However, unlike grocery stores and other important services that affect Americans on a daily basis, the current public education system often locks students into particular schools based solely on students' addresses. This system does not allow many options for parents when schools underperform or fail to meet their children's needs. *See generally* Greg Forster, *A Win-Win Solution: The Empirical Evidence*

on How Vouchers Affect Public Schools, The Friedman Foundation for Educational Choice, Feb. 2009, at 11 (Forster Article).[2] Though wealthy parents can move to another area or pay for private school tuition out of pocket, these options are not available to students from impoverished backgrounds. *Id.*

In dissent to the denial rehearing en banc here, Judge O'Scannlain recognized that the lower court's ruling could severely limit the availability of school choice options in states throughout the country.

> I dissent . . . because . . . the panel's holding casts a pall over comparable educational tax-credit schemes in states across the nation and could derail legislative efforts in four states within our circuit to create similar programs. In short, the panel's conclusion invalidates an increasingly popular method for providing school choice, jeopardizing the educational opportunities of hundreds of thousands of children nationwide.

Winn, 586 F.3d at 659 (en banc) (O'Scannlain, J., dissenting). Indeed, school choice is already playing an important role in solving this country's educational crisis by encouraging competition, increasing academic achievement, and lowering educational costs. At the beginning of 2009, there were already 24 school choice programs in 14 states and Washington, D.C. Forster Article at 10. "Over 160,000 students use these programs to attend private schools using public

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[2] *Available at* http://www.edchoice.org/Research/Reports/A-Win-Win-Solution----The-Empirical-Evdence-on-How-Vouchers-affect-Public-Schools.aspx (last visited Aug. 2, 2010).

funds," and these programs have shown dramatic success in the areas including parental benefits, student achievement, and lower educational costs. *Id.* To be sure, no two school choice programs are alike, but they are united in providing choice to parents who are otherwise locked into the public school in their geographical area. Indeed, Judge O'Scannlain recognized the similarity between Section 1089 and the "tax-credit schemes" in place (and being proposed) in numerous states throughout the country. *Winn*, 586 F.3d at 659 (en banc) (O'Scannlain, J., dissenting) (citing Fla. Stat. § 220.187; Ga. Code Ann. § 48-7-29.16; Ind. Code § 6-3.1-30.5; Iowa Code § 422.11S; 24 Pa. Stat. Ann. § 20-2005-B; R.I. Gen. Laws § 44-62-2; A.B. 279, 2009-10 Leg., Reg. Sess., § 1 (Cal. 2009); S.B. 342, 61st Leg., Reg. Sess., § 1(3)(b)-(c) (Mont. 2009); S.B. 289, 75th Leg., Reg. Sess., § 6(1) (Nev. 2009); H.B. 2754, 75th Leg., Reg. Sess. (Or. 2009)).

Without parental choice, schools "lack the positive incentive for better performance that most other types of service institutions take for granted." Forster Article at 11. Just as monopolies "provide poor quality because they have little incentive to serve their clients well[,]" so too, education services and schools' responsiveness to consumer demand deteriorates when suppliers are isolated from consumer preferences. *Id.* at 12. School choice programs break that monopoly, giving parents options and mobility, thereby disciplining inadequate schools and encouraging them to create a better learning environment for students. Thus, even public school students without vouchers benefit from school choice because these programs create competition among the existing public schools.

Therefore, it is unsurprising that school choice programs are very popular with parents. On the Florida Department of Education's website, parents have presented personal accounts of the way school choice has changed their lives. *See* Florida Department of Education, Office of Independent Education & Parental Choice, Scholarship Success Stories.[3] Some speak to the satisfaction that comes with selecting schools that suit their children's needs. *Id.* Other parents focus on their children's academic improvement, or how for the first time, students began to talk about college and their futures. *Id.* One pleased parent of a child in a Florida voucher program emphasized that school choice creates a system where educational decisions are in the hands of families—so parents "could no longer place the blame on others." *Id.*

A. School Choice Improves Students' Academic Achievement

School choice has been credited with improving academic achievement in K-12 education in locations across the country. In ten studies of school choice program cities across the nation[4], researchers used

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[3] *Available at* http://www.floridaschoolchoice.org/Information/success_stories/scholarships.asp (last visited Aug. 2, 2010).

[4] *See* The Foundation for Educational Choice, *Erasing the Myths of School Choice*, Feb. 28, 2009, *available at* http://www.edchoice.org/Research/Reports/Erasing-the-Myths-of-School-Choice.aspx (last visited Aug. 2, 2010); Jay Greene, Paul Peterson, & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment* in *Learning from School Choice* (Paul Peterson & Bryan Hassel eds. 1998); Cecilia Rouse, *Private School Vouchers and Student Achievement*, 113 Q. J. of Econ. 553 (May 1998), *available at* http://ideas.repec.org/p/pri/indrel/750.html (last visited Aug. 2,

(continued...)

random-assignment methods to select students to receive an educational voucher. The results were unmistakable. For example, in *Erasing the Myths of School Choice*, researchers compared the progress of voucher students with a control group of students over periods from one to four years. The Foundation for Educational Choice, *Erasing the Myths of School Choice*. Researchers then randomly assigned which students received vouchers and which did not, while controlling for external factors such as previous academic achievement. *Id.* The voucher students routinely showed better academic outcomes than the control group. *Id.* More, the studies revealed no negative effects for voucher students. *Id.* In all but one, the positive results demonstrated, with a high level of statistical certainty, that the improved student achievement of all or most students was not mere coincidence, but instead directly correlated to the use of vouchers. *Id.* Reading and math levels increased

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[4] (...continued)
2010); Jay Greene, *Vouchers in Charlotte*, Education Next (Summer 2001), *available at* http://educationnext.org/files/ednext20012_46b.pdf (last visited Aug. 2, 2010); William Howell & Paul Peterson, *The Education Gap*, Brookings Institution Press, 2002 (revised 2006); John Barnard, et al., *Principal Stratification Approach to Broken Randomized Experiments: A Case Study of School Choice Vouchers in New York City*, 98 J. Am. Statistical Assoc. 299 (June 2003), *available at* http://biosun01.biostat.jhsph.edu/~cfrangak/papers/sc/vouchers.pdf (last visited Aug. 2, 2010); Alan Krueger & Pei Zhu, *Another Look at the New York City School Voucher Experiment*, 47 Am. Behav. Scientist 658 (Jan. 2004), *available at* http://ideas.repec.org/p/nbr/nberwo/9418.html (last visited Aug. 2, 2010); Joshua Cowen, *School Choice as a Latent Variable: Estimating the "Complier Average Causal Effect" of Vouchers in Charlotte*, 36 Policy Studies J. 301 (Nov. 2007), *available at* http://www3.interscience.wiley.com/journal/119400330/abstract?CRETRY=1&SRETRY=0 (last visited Aug. 2, 2010).

anywhere from five to eleven points compared to the control groups without vouchers. *Id.* Undoubtedly, some subgroups benefitted more than others from the voucher program (for example black students or students scoring below the city median generally showed more improvement). Nevertheless, half of the studies evidenced improvement for all voucher students. *Id.*

Moreover, numerous empirical studies[5] demonstrate how vouchers have improved Milwaukee public schools. In a 2002 study using a regression analysis of the Milwaukee voucher program, researchers found that "greater exposure to vouchers had a positive effect on year-to-year changes in public school outcomes." Forster Article at 17. That study found that the positive effect of exposure to vouchers was so strong that a school with all its students eligible for vouchers could be "expected to outperform a school

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[5] Caroline Minter Hoxby, *Rising Tide*, Education Next, Hoover Institution (Winter 2001), *available at* http://www.heartland.org/custom/semod_policybot/pdf/17457.pdf (last visited Aug. 2, 2010); Jay Greene & Greg Forster, *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio*, Civic Bulletin, Manhattan Institute (Oct. 2002), *available at* http://www.manhattan-institute.org/pdf/cb_27.pdf (last visited Aug. 2, 2010); Rajashri Chakrabarti, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs*, Staff Reports 315, Federal Reserve Bank of New York (Jan. 2008), *available at* http://ideas.repec.org/p/ecm/nasm04/221.html (last visited Aug. 2, 2010); Rajashri Chakrabarti, *Can Increasing Private School Participation and Monetary Loss in a Voucher Program Affect Public School Performance? Evidence from Milwaukee*, 92 J. Pub. Econ. 1371 (June 2008), *available at* http://ideas.repec.org/p/wpa/wuwppe/0512003.html (last visited Aug. 2, 2010).

with only half its students eligible by 15 percentile points over four years." *Id.*

In the Edgewood school district in San Antonio, Texas, where 93% of the students were eligible for lunch programs and where the district had a 97% Hispanic population, researchers used a program that provided vouchers for every student in the district. Greene & Forster, *Rising to the Challenge*, at 6. They found that Edgewood's "year-to-year test score gain outperformed those of 85 percent of school districts in Texas." *Id.* Researchers concluded that where strong competition from private schools was present, that "private schools . . . [drove] public school improvements." *Id.* at 7.

Graduation rates are also positively affected by school choice programs. In June, 2010 the U.S. Department of Education released its latest report on D.C.'s Opportunity Scholarship Program (OSP); researchers found that the offer of an OSP scholarship increased students' probability of completing high school by 12 percentage points overall. *See* Patrick Wolf, et al, *Evaluation of the DC Opportunity Scholarship Program: Final Report*, U.S. Department of Education Institute of Education Sciences, National Center for Educational Evaluation and Regional Assistance (2010).[6] The graduation rate was 82% for the group that had been offered vouchers, compared to 70% for the control group. *Id.* at 41. Additionally, the offer of an OSP voucher improved the graduation prospects of students by 13 percentage points. *Id.* at 41.

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[6] *Available at* http://ies.ed.gov/ncee/pubs/20104018/index.asp (last visited Aug. 2, 2010).

B. Special Needs Students Benefit from School Choice

Section 1089 specifically recognizes that STOs can be used to benefit special needs students. *See* Ariz. Rev. Stat. § 43-1089(H). Until last year, Arizona had a separate voucher program designed specifically for special need students. *See* Ariz. Rev. Stat. § 15-891 *invalidated by Cain*, 202 P.3d at 1185. The Arizona legislature, through its efforts with Section 1089 and the program struck down in *Cain*, have demonstrated a strong commitment to improving the educational circumstances of special needs students through vouchers.

As seen in numerous studies using random assignment methods, special needs students can benefit greatly from school choice programs. For instance, the McKay Scholarships for Students with Disabilities Program, afforded over 20,500 disabled Florida students the opportunity to attend a private school during the 2008-09 school year. Disabilities covered under the McKay program include K-12 students who are documented as having an intellectual disability; a speech or language impairment; a hearing impairment, including deafness; a visual impairment, including blindness; a dual sensory impairment; an emotional or behavioral disability; a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; a traumatic brain injury; a developmental delay; or autism spectrum disorder.

Researchers have compared special education services provided by public and private schools. In a study conducted by the Center for Civic Innovation at the Manhattan Institute, researchers compared the

services for participants in the McKay voucher program in both their private and public institutions. Jay P. Greene & Greg Forster, *Vouchers for Special Education Students: An Evaluation of Florida's McKay Scholarship Program*, Center for Civic Innovation at the Manhattan Institute, Civic Report No. 38, June 2003.[7] Parents reported dramatically higher rates of satisfaction with their children's academic progress: 93% were satisfied with the McKay school verses 33% who were satisfied with their previous public school. *Id.* at 4. One reason for the difference in satisfaction levels may be because two-thirds of families reported that public schools failed to provide all of the special education services that they were required to provide by law, while only 12% reported that private schools did not provide services which they had promised to provide. *Id.* at 7.

This study also shows fewer instances of victimization and behavior problems in private schools than public schools. In public schools, nearly 47% of students were ridiculed for their disabilities and almost 25% were physically assaulted. *Id.* at 9. Conversely, the private schools showed only 5% who were bothered and 6% who were assaulted. *Id.* Similar programs for special needs students are in place in Georgia, Ohio, and Utah.

C. School Choice Lowers Educational Costs

School choice provides students with quality educations at a fraction of the cost. From 1990 to 2006, the nation's school choice programs saved a total of

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[7] *Available at* http://www.manhattan-institute.org/html/cr_38.htm (last visited Aug. 2, 2010).

$422 million for local school districts and $22 million for state budgets. Susan Aud, *Education by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006* (Apr. 2007), The Friedman Foundation for Educational Choice, Executive Summary.[8] Additionally, schools in choice programs generally operate on a tighter budget than district schools do, receiving from the government only about 80% per pupil of the amount received by district schools. Chester E. Finn, et al., *Charter School Funding: Inequity's Next Frontier*, Thomas B. Fordham Institute, Fordham Foundation, at Major Findings (2005).[9] In many states benefitting from school choice, local districts can retain a portion of funding which they would have spent on the students in choice programs; those extra tax dollars can be spread across the remaining public school students when enrollment declines take place. *See* Jay Greene, et al., *Expanding Choice in Elementary and Secondary Education*, Brown Center on Education Policy at the Brookings Institute (Feb. 2, 2010).[10]

In a Goldwater Institute study from 2005, analysts found that absent private schools, the State of Arizona and localities would have had to spend an additional $260 million during the 1999-2000 school year to educate the more than 44,000 children who

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[8] *Available at* http://www.heartland.org/custom/semod_policybot/pdf/21956.pdf (last visited Aug. 2, 2010).

[9] *Available at* http://www.defendcharterschools.org/CharterSchoolFunding.pdf (last visited Aug. 2, 2010).

[10] *Available at* http://www.brookings.edu/~/media/Files/rc/reports/2010/0202_school_choice/0202_school_choice.pdf (last visited Aug. 2, 2010).

reduced necessary public school expenditures by attending private schools. Ross Groen & Vicki Murray, *Survey of Arizona Private Schools: Tuition, Testing, and Curricula*, Goldwater Institute Policy Report No. 199, at 16 (Jan. 5, 2005).[11] The study estimated, that from 2004 through 2016, if private schools continued to educate just 5% of the state's K-12 population, roughly 660,000 students would not have to be educated in public schools, saving the state roughly $2.6 billion. *Id.* at 18. The study noted that the savings from just one child beginning and completing their K-12 education in a private school could save the state and local governments nearly $100,000 over 13 years. *Id.*

In a related study, the Goldwater Institute conducted a survey of 325 private schools of which nearly 150 responded. Andrew J. Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, Goldwater Institute Policy Report No. 213, Goldwater Institute (Oct. 17, 2006).[12] The survey showed that Arizona private schools spent $5,545 per pupil, more than $2,000 less than the average Arizona public school which spent $7,644. *Id.* at 7. The study also showed that Arizona private school tuition was less than half of the per-pupil public school average revenue. *Id.* at 4. Even though the public schools were spending more money, private schools had higher high school graduation rates, higher college acceptance rates, and better school facilities. *Id.* at 3-6. In 2005,

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[11] *Available at* http://www.goldwaterinstitute.org/article/1299 (last visited Aug. 2, 2010).

[12] *Available at* http://www.goldwaterinstitute.org/article/1851 (last visited Aug. 2, 2010).

22.5% of Arizona private school students were receiving tuition tax credit scholarships under the Arizona Tuition Tax Credit program. *Id.* at 22.

Many respected empirical studies show that school choice has numerous positive benefits. Parents are able to find schools for their children which best suit their needs. Competition creates positive incentives for schools to improve and provide quality education. Students are no longer exclusively tied to public schools that have been determined for them by their addresses. Families of special needs students, minority students, and low-income students have options beyond moving to other districts or paying the entirety of private school tuition. School choice programs decrease educational costs and save states millions of dollars annually, and provide superior educational experiences. The ability of school choice to flourish is imperative because the success of future school choice programs is a key element in solving the current American K-12 educational crisis.

CONCLUSION

Since this Court's decision in *Zelman*, school choice has taken off in America. Hundreds of thousands of children have escaped failing government schools, seeking and finding wonderful educational opportunities. At less than the cost of public schools, school choice has improved student achievement, and provided special needs students with schools geared toward their unique requirements. As a result, school choice has been applauded by parents, students, and taxpayers nationwide.

This Court is now presented with a follow-up to *Zelman*. In ruling on Establishment Clause challenges to school programs in the past, this Court has continuously emphasized the importance of neutrality and independent choice. Arizona's Section 1089 fulfills both of these requirements. Section 1089 is neutral toward religion by not preferring sectarian over secular schools in either schools receiving funds or STOs that provide funds. Furthermore, Section 1089 has multiple levels of independent choice before any money can go to a sectarian school. Therefore, the Court should reverse the decision of the lower court.

DATED: August, 2010.

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AMICUS CURIAE BRIEF

Nos. 09-987, 09-991

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

In The Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, ET AL.,
Petitioners,

v.

KATHLEEN M. WINN, ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 25 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion or defending the rights of individuals against illegal search and seizure, The Rutherford Institute offers assistance—and hope—to thousands.

Each year The Institute receives numerous complaints involving misinterpretation of the Establishment Clause by a variety of government officers and agencies. The extent of misunderstanding regarding the proper scope of the

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[1] Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Sup. Ct. Rule 37. No counsel to any party authored this brief in whole or in part, nor has any party or counsel to a party made a monetary contribution funding the preparation of this brief.

Establishment Clause, and the number of potential lawsuits resulting from this misunderstanding is alarming. The resolution of the taxpayer standing issue presented in this case is therefore of great importance. The Institute presents this brief in the hope that the Court will bring clarity to the application of taxpayer standing jurisprudence in Establishment Clause cases, even if doing so requires the Court to modify or re-work existing rules.

SUMMARY OF THE ARGUMENT

Under Article III of the United States Constitution, the scope of the judiciary's authority is limited to resolving "cases and controversies." The doctrine of standing expounded by the United States Supreme Court constitutes its practical application of this jurisdictional limitation.

While a citizen's status as taxpayer is generally an insufficient basis for standing to challenge an expenditure of public funds, the Court has applied a modified standing analysis to cases where plaintiffs claim that a law violates the Establishment Clause of the First Amendment. Even under this variation of standing analysis, *amicus* submits that Respondents in this case cannot demonstrate standing.

More fundamentally, however, *amicus* submits that judicial application of this species of the Court's standing doctrine has proven it to be inadequately moored to the basic considerations of standing as an Article III jurisdictional requirement. In particular,

the Court's formulation of taxpayer standing in Establishment Clause cases effectively confers standing upon the citizenry at large to require the adjudication of generalized grievances regarding the operation of government. The current framework does not effectively ensure that the plaintiff has a real "injury-in-fact" in the sense that is required to create a genuine "case or controversy."

It is obvious that the Court's taxpayer standing doctrine, as presently formulated, has become a thicket of inexplicable rules and hollow distinctions; a thicket that continues to ensnare well-meaning lower courts. *Amicus* submits that a clarified or reworked taxpayer standing framework would not only afford proper respect to Article III limitations on judicial power but would also foster a proper understanding of the Establishment Clause and proper adjudications of claims asserted under it.

Finally, the Ninth Circuit erred inasmuch as the tax credit at issue here, Ariz. Rev. Stat. § 1089 ("Section 1089"), affords parents "true private choice," which is the dispositive factor in ascertaining Establishment Clause violations. Indeed, the Ninth Circuit appears to have been misinformed. A review of the program demonstrates that Arizona taxpayers generally donate to both secular and religious schools, and both taxpayers and parents have a wide range of options from which to choose.

ARGUMENT

I. Under The Current Taxpayer Standing Framework, The Taxpayers In This Case Cannot Establish Standing.

A. The Current Taxpayer Standing Framework.

To determine whether a plaintiff possesses the "irreducible constitutional minimum of standing," the Court has looked to three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered an "injury in fact"—the invasion of a legally protected interest which is concrete and particularized and actual or imminent as opposed to conjectural or hypothetical. *Id.* (*citing Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741 n. 16 (1972); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Second, there must be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the conduct of the defendant rather than the result of actions by a third party not before the court. *Lujan*, 504 U.S. at 560-61 (*quoting Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). And finally, it must be likely that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561 (*quoting Simon*, 426 US. at 38, 43).

It has long been established that a prospective plaintiff may not generally bring suits to challenge

government actions based on his or her status as a taxpayer. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007). This is because the Court has determined that

> a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Id. at 601.

In *Frothingham v. Mellon*, 262 U.S. 447 (1923), this Court, in rejecting a taxpayer's claim to standing, explained that the party invoking judicial review must show not only that the statute was invalid but that he had sustained or would sustain some direct injury as the result of its enforcement, *and not merely that he suffers in some indefinite way in common with people generally*. *Id.* at 488 (emphasis added).

The Court departed from this general rule when it held in *Flast v. Cohen*, 392 U.S. 83 (1968), that federal taxpayers had standing to challenge expenditures pursuant to the Elementary and Secondary Education Act. According to the taxpayer standing analysis announced in *Flast*, a taxpayer will be deemed to have standing if he can first "establish

a logical link between [taxpayer] status and the type of legislative enactment attacked."[2] *Id.* at 101. Under the second prong of *Flast*, the taxpayer must establish a nexus between his or her status as taxpayer and the type of constitutional infringement alleged. *Id.* at 102. In practice, this Court has limited taxpayer standing to cases in which the alleged constitutional infringement is an Establishment Clause violation. *See Hein*, 551 U.S. at 609 (noting that the Court has declined to find taxpayer standing in suits alleging violations of other constitutional provisions).

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[2] Under this prong, the Court has found taxpayer standing only where taxpayers allege the unconstitutionality of exercises of congressional power under the taxing and spending clause of Article I, § 8 of the Constitution. It is assumed that exercises of *state* legislative power to tax and spend would equally satisfy the first prong of the Court's taxpayer standing analysis, but this is not a foregone conclusion in light of the Court's strict construction of the analysis in other cases. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347-49 (2006) (rejecting plaintiffs' claim of taxpayer standing to challenge state and municipal tax expenditures on Commerce Clause grounds; the Court did not rely on a distinction between state and federal legislative action in rejecting standing claim). *Cf. Hein*, 551 U.S. at 610 (noting that the Court has "refused to extend *Flast* to permit taxpayer standing for Establishment Clause challenges that do not implicate Congress' taxing and spending power").

B. The Taxpayers Cannot Establish The Requisite "Nexus" Between Their Status As Taxpayers And The Arizona Statute.

A recognition of taxpayer standing in this case would represent a significant expansion of *Flast* that would render the rationale of *Frothingham* nugatory in Establishment Clause cases. This is because Respondents do not assert even the type of injury for which the *Flast* analysis provided judicial cognizance.

This Court has repeatedly emphasized that the judiciary may not entertain suits in which taxpayers raise general grievances regarding the government's expenditures of tax revenues. *See, e.g., Hein*, 551 U.S. at 598 ("As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing."); *DaimlerChrysler*, 547 U.S. at 344 (reiterating that where alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, the taxpayer's grievance is not concrete but is merely a grievance he or she suffers in common with people generally).

The fundamental deficiency with claims of taxpayer standing to challenge government expenditures is that the alleged injury is not "concrete and particularized." *DaimlerChrysler*, 547 U.S. at 344 (*quoting Lujan*, 504 U.S. at 560). *See also Doremus v. Board of Educ.*, 342 U.S. 429, 433-34

(1952) ("[T]he interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure.").

The taxpayer standing analysis the Court created in *Flast* represented an attempt to provide a forum for the adjudication of citizens' claims that the government has violated the Establishment Clause by wrongful spending of the taxpayers' hard-earned dollars. In 2006 the Court described the "injury" for which the *Flast* Court sought to provide redress as the "extraction and spending of tax money in aid of religion." *DaimlerChrysler*, 547 U.S. at 348 (*quoting Flast*, 392 U.S. at 106). *Amicus* submits that some form of "extraction" of general tax dollars—even of a purely nominal amount—from the taxpayer alleging an Establishment Clause violation is an essential component of the formula by which *Flast* allows a plaintiff to demonstrate taxpayer standing. For it is this "extraction" that most nearly constitutes the "injury-in-fact" requirement for standing under Article III and therefore evinces the required "nexus" between taxpayer status and the challenged government action.

Certainly there is some element of legal fiction involved in defining the type of "extraction" involved in *Flast* as an injury-in-fact. Indeed, this is why the variation of traditional standing principles was necessary at all. For under traditional standing requirements, the taxpayer in *Flast* could not have

identified a direct pecuniary injury resulting from the challenged statute. This is because, ordinarily, taxes are not levied for the fulfillment of particular statutes. The taxpayer cannot calculate a percentage of his tax payment that was directed toward the challenged program, and his tax liability would likely be the same with or without the offending law. *See Flast*, 392 U.S. at 118-19 (Harlan, J., dissenting) (describing why taxpayers' interests in the expenditure of public funds are held in common with the general public). But to read *Flast* in the light most consistent with the Court's standing doctrine as a whole is to define the fictitious injury-in-fact it seeks to redress as the unconstitutional spending of dollars that were collected from the collective pocketbooks of the citizenry.

This reading of *Flast* reflects the Court's reliance upon the concerns expressed in James Madison's Memorial and Remonstrance Against Religious Assessments. Specifically, the Court quoted Madison's observation that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 *Writings of James Madison* 183, 186 (Hunt ed., 1901) (cited in *Flast*, 392 U.S. at 83).

While it is difficult to assess the purpose and extent of the legal fiction the *Flast* Court adopted with regard to the "injury-in-fact" sustained by the taxpayers found to have standing, this much is clear:

the taxpayers in *Flast* were considered to be "victims" of a law by which Congress directed some portion of general funds that had been *extracted from taxpayers* to religious organizations. By contrast, Respondents in the case at bar can make no such claim. Respondents in the case at bar have come before the judiciary to complain that *other taxpayers, not before the court*, have been given a generally available benefit in exchange for donating scholarship money. The critical fact in the standing analysis is this: under the Arizona law in question, not one cent of Respondents' money is at stake.

A finding that Respondents possess standing as taxpayers under these circumstances would be nothing less than an outright repudiation of *Frothingham* principles in cases alleging Establishment Clause violations. Moreover, such a finding would require the Court to effectively overrule *Doremus v. Board of Educ.*, where the Court stated:

> Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct

> injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

342 U.S. at 434 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

It is at least plausible to harmonize *Doremus* with *Flast* and *Bowen v. Kendrick*, 487 U.S. 589 (1988) (finding taxpayer standing to challenge grants distributed to religious organizations), by focusing on the fact that *Flast* and *Bowen* involved the extraction of general tax dollars that were specifically directed toward religious institutions while the allegedly unconstitutional Bible reading in *Doremus* entailed no marginal cost to taxpayers. However, if taxpayer standing is found for Respondents in this case, even that foggy distinction dissolves. Respondents' sole complaint is that other taxpayers are being rewarded for directing their own money—private money—to the STO of their choosing, just as Respondents themselves would be rewarded should they choose to donate funds to the STO of their choosing.

The nature of state action in this case (granting of tax credits) renders Respondents' taxpayer standing claim even more attenuated than those previously rejected by the Court. In *DaimlerChrysler*, 547 U.S. at 343-44, where the Court rejected the taxpayer's standing claim, the Court applied the same analysis to the taxpayer's challenge of "tax expenditures" as used in challenges to direct spending. The Court

noted, however, that it was unclear that the challenged tax breaks even depleted the treasury. *Id.* at 344. This is because the very purpose of granting tax benefits was to spur economic activity, which in turn increases government revenues. *Id.*

But even if the Court were to treat Arizona's tax credits as "spending" for purposes of taxpayer standing analysis, the fact that no money whatsoever has ever been "extracted" from Respondents in support of STOs demands the conclusion that Respondents have no standing in the case at bar. In this context, Respondents cannot demonstrate the required nexus between their status as taxpayers and the legislative action; none of their tax dollars have been affected.

Only by substantially *extending* the *Flast* analysis can the Court find that Respondent taxpayers have standing to challenge the Arizona law here. A short three years ago, this Court specifically declined to extend the *Flast* analysis, choosing instead to "leave *Flast* as we found it." *Hein*, 551 U.S. at 615. *Amicus* respectfully submits that the Court can only leave *Flast* as it was found by rejecting Respondents' claim of taxpayer standing in this case.

Amicus respectfully submits that Respondents' claim of taxpayer standing must be rejected. Any other holding would violate the most fundamental principles of the Court's standing doctrine and would represent an unwarranted extension of *Flast*.

II. Because Of Inherent Deficiencies In The *Flast* Analysis, The Court Should Overrule *Flast* And Restore The General Rule Of *Frothingham*, Requiring A Taxpayer To Demonstrate A Direct, Pecuniary Injury As A Prerequisite To Standing.

From its inception up until now, *Flast* has spawned confusion and consternation among the federal judiciary. *See, e.g.*, *Flast*, 392 U.S. at 116-17 (Harlan, J., dissenting) (observing that the *Flast* doctrine "rests on premises that do not withstand analysis"); *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354, 1358 (8th Cir. 1989) (rejecting district court's ruling that *Doremus* required taxpayer to show an increase in his tax bill and holding instead that only a "measurable expenditure of tax money" is required, based on the court's "fear that the district court's decision could lead to the abolition of taxpayer standing altogether"); *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988 (2006) (Flaum, C. J., concurring in denial of rehearing *en banc*) (noting the "obvious tension" in taxpayer standing jurisprudence) and (Easterbrook, J., concurring in denial of rehearing *en banc*) (calling taxpayer standing doctrine "arbitrary"); *Hein*, 551 U.S. at 618-36 (Scalia, J., concurring) (calling for *Flast* to be overruled) and (Souter, J., dissenting) (finding Court's holding in *Hein* inconsistent with *Flast*).

The basis for the confusion is this: it is impossible to logically harmonize *Flast*'s taxpayer standing analysis in Establishment Clause cases with the general *Frothingham* rule against taxpayer standing, to which the Court still pledges allegiance. The Court's creation of and adherence to the *Flast* analysis presumably must rest on one of two premises. Either the two-pronged *Flast* test is merely a way of determining that the taxpayer plaintiff does, in fact, possess all the traditional components of Article III standing, or the Establishment Clause is such a peculiar constitutional mandate as to justify the Court in lowering Article III standing requirements where an Establishment Clause violation is alleged. *Amicus* respectfully submits that while both premises have been halfheartedly suggested at various times, the former is legally incorrect and the latter is not born out by the Court's holdings.

A. Satisfaction Of The Two-Pronged *Flast* Test Is Not The Equivalent Of Satisfying Traditional Article III Standing Requirements.

The first element of constitutional standing requires a plaintiff to demonstrate, at minimum, (1) a concrete and particularized injury in fact that is (2) fairly traceable to the defendant's alleged unlawful conduct and (3) likely to be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61. In *Frothingham*, 262 U.S. at 483 (involving the Tenth Amendment) and *Doremus*, 342 U.S. at 435

(involving the Establishment Clause), the Court rejected claims of taxpayer standing because the taxpayers had not demonstrated any direct injuries. Both cases indicate that the "injury-in-fact" requirement of standing is only met where a taxpayer plaintiff can demonstrate that he personally suffers a monetary detriment as a result of the challenged law. The Court rejected the taxpayers' claims of standing in both cases because the plaintiff raised only generalized grievances shared in common with the general public.

In *Flast*, the Court announced the now well-known (though as yet inexplicable) two-prong analysis by which it determined that the taxpayers there did have standing in spite of the *Frothingham* doctrine. However, the Court has never explained how its two-pronged test for taxpayer standing related to a finding that the taxpayer plaintiff possessed the requisite injury-in-fact required under traditional standing doctrine.

The taxpayer in *Flast* (challenging expenditures under the Elementary and Secondary Education Act) was no more able to demonstrate direct, pecuniary injury than the taxpayer in *Frothingham* (challenging expenditures under the Maternity Act of 1921). *See Hein*, 551 U.S. at 623 (Scalia, J., concurring) ("the taxpayers in *Flast* were no more able to prove that success on the merits would reduce their tax burden than was the taxpayer in *Frothingham*"). The only logical conclusion, then, is that the *Flast* Court decided to employ a sort of legal

fiction to *deem* a generalized grievance to be a direct injury-in-fact under certain circumstances. Through the lens of *Flast*, in other words, the Court views the expenditure of general funds in violation of the Establishment Clause as if it resulted in a direct, personal injury to the specific taxpayer asserting standing.

The *Flast* holding was immediately criticized as entirely inconsistent with *Frothingham* and illogical. Justice Harlan, dissenting from the holding, observed that the Court had effectively conferred standing on "non-Hohfeldian plaintiffs"—plaintiffs who represent public interests as opposed to the personal and proprietary interests of the traditional plaintiff. *Flast*, 392 U.S. at 120 (Harlan, J., dissenting) (borrowing phrase from Wesley N. Hohfeld, *Fundamental Legal Conceptions* (1923)). More recently, Justice Scalia has called for *Flast* to be overruled, decrying the fact that plaintiffs with standing under the *Flast* exception possess only "Psychic Injury," as opposed to the "Wallet Injury" that had always been the cornerstone of Article III standing in this type of case. *Hein*, 551 U.S. at 619 (Scalia, J., concurring). Justice Scalia describes this Psychic Injury as "the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner." *Id.* (Scalia, J., *concurring*).

Justice Scalia stated the problem with *Flast* this way:

> [T]his conceptualizing of injury in fact in purely mental terms conflicts squarely with the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the generalized grievance that the law is being violated. As we reaffirmed unanimously just this Term: "We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Hein, 551 U.S. at 620 (Scalia, J., concurring) (quoting *Lance v. Coffman*, 549 U.S. 432, 439 (2007) (*per curiam*)).

Amicus respectfully submits that these objections demand the Court's careful consideration. Neither prong of the *Flast* analysis appears to bear any relation whatsoever to a determination that the taxpayer plaintiff complains of the type of concrete, particularized, injury-in-fact, that the Court has always required as a component of standing.

B. There Is No Principled Reason For The Relaxation Of Standing Requirements

Where Laws Are Challenged On Establishment Clause Grounds.

If, as *amicus* and others have argued, the *Flast* holding represents a substantial relaxation of the Court's standing doctrine for Establishment Clause cases, it must rest on the premise that the peculiar nature of the Establishment Clause justifies the adjudication of lawsuits where the taxpayer plaintiff cannot demonstrate standing in the traditional sense. This premise, however, is inconsistent with the Court's holdings in this area. Moreover, it is unnecessary for the Court to create an exception to critical Article III standing requirements in order to ensure compliance with the Establishment Clause.

It may be argued that the peculiar purpose of the Establishment Clause justifies the adjudication of lawsuits brought by plaintiffs who have suffered only generalized psychic or mental injuries. However, if this is so, then the Court's strict application of the *Flast* exception to allow only cases involving expenditures authorized by specific congressional enactments makes little sense. One would expect, rather, that the Court would consider taxpayer standing to be coextensive with the variety of contexts in which Establishment Clause violations have been found.[3] There are certainly a multitude of

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[3] *Amicus* itself relied upon this expectation when it argued, in 2007, that the Court should recognize taxpayer standing for the taxpayer plaintiffs in *Hein*. The Institute found it inconceivable that the taxpayer plaintiffs there could be denied standing based upon an artificial

routes by which various branches of government might violate the Establishment Clause, at least according to contemporary interpretations of that Clause. Because only government officials or agencies may violate the Establishment Clause, most, if not all, types of violations can be traced to some expenditure of taxpayer funds.

As Justice Harlan noted, "[p]resumably the Court does not believe that regulatory programs are necessarily less destructive of First Amendment rights, or that regulatory programs are necessarily less prodigal of public funds than are grants-in-aid, for both these general propositions are demonstrably false." *Flast*, 392 U.S. at 123 (Harlan, J., dissenting). So if the Court's creation of the *Flast* analysis is meant merely to create a vehicle by which taxpayers can bring legal challenges to Establishment Clause violations, why should the vehicle not be available regardless of the manifestation of the offending law or policy?

The Court's initial adoption of the *Flast* standard was heavily influenced by James Madison's writings concerning the taxpayer's right not to "contribute three pence . . . for the support of any one [religious] establishment." *See Flast*, 392 U.S. at 103 (quoting 2

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distinction between spending decisions by Congress and those by the executive branch. In light of the Court's inconsistent application of taxpayer standing analysis in Establishment Clause cases, however, *amicus* now requests that the Court rework or overrule the *Flast* framework.

Writings of James Madison 186 (G. Hunt ed. 1901)). However, careful examination reveals that even the Court's laudable goal of blocking coerced contributions toward religion does not require the Court to depart from its traditional standing doctrine by applying the anomalous and incomprehensible *Flast* analysis.

The Court need not fear that an adherence to the traditional standing principles outlined and applied in *Frothingham* would result in the realization of the fears expressed by James Madison. As this Court, collectively, and other individual learned judges have recognized, taxpayers in all events have standing to challenge the collection of specific tax assessments as unconstitutional, because being forced to pay such taxes cause real economic injury to the individual taxpayers. *Hein*, 551 U.S. at 599 (citing *Follett v. Town of McCormick*, 321 U.S. 573 (1944)). Justice Harlan explained:

> It could hardly be disputed that federal taxpayers may, as taxpayers, contest the constitutionality of tax obligations imposed severally upon them by federal statute. Such a challenge may be made by way of defense to an action by the United States to recover the amount of a challenged tax debt, or to a prosecution for willful failure to pay or to report the tax. Moreover, such a challenge may provide the basis of an action by a taxpayer to obtain the refund of a

> previous tax payment. . . . An action brought to contest the validity of tax liabilities assessed to the plaintiff is designed to vindicate interests that are personal and proprietary.

Flast, 392 U.S. at 117 (Harlan, J., dissenting) (internal citations omitted).

Application of the Court's traditional standing requirements would only curtail taxpayer challenges to laws that result in no direct injury to the taxpayer. In fact, as *amicus* will explain next in Part III below, the fundamental concern underlying the Establishment Clause is actually best served by the Court's adherence to its traditional Article III standing analysis.

III. The Application Of The *Frothingham* Principle To Taxpayers Raising Establishment Clause Claims Would Best Serve The Interests Of The Establishment Clause.

Notwithstanding the confusion engendered by *Flast* itself, *amicus* submits that the Court has always been correct in viewing this concern of Madison—that citizens not be coerced to support, in any manner, an official state religion—as precisely the spirit behind the Establishment Clause.

Amicus believes the Establishment Clause to be one of the most widely misunderstood provisions in

the Bill of Rights. A survey of contemporary First Amendment jurisprudence reveals that the Establishment Clause has been transformed from a shield protecting religious liberty into a sword used to extricate all traces of religion from the public arena. In the name of the Establishment Clause, students are prohibited from giving valedictory addresses that refer to their personal faith, city councils are threatened with costly lawsuits if they allow private citizens to open their sessions with invocations, and religiously neutral state laws are challenged because they reward donations by private citizens to scholarships for a universe of private schools that merely *includes* religious ones. An honest evaluation of historical facts serves to immediately disillusion any serious student of the belief that these results could have been intended or even imagined by those who drafted and adopted the Bill of Rights.

Amicus submits that by adhering to traditional standing requirements, as outlined in *Frothingham*, the Court could curtail a bevy of lawsuits in which plaintiffs with specious claims of "injury" challenge a range of government policies or actions that do no more than express a respectful benevolence toward the religious traditions of our nation. This is not to say that the Establishment Clause would be reduced to an empty platitude or that its real objective could not be judicially enforced.

As explained in Part II, above, where the legislature enacts a specific tax in support of religion,

thus producing a genuine (albeit minimal) pecuniary injury, the Establishment Clause provides a taxpayer with both a legitimate defense against an action for the collection of the tax and the basis of an action to obtain a refund for the tax payment. *See Flast*, 392 U.S. at 117 (Harlan, J., dissenting) (citing *Hylton v. United States*, 3 Dall. 171 (1795); *McCray v. United States*, 195 U.S. 27 (1904); *United States v. Butler*, 297 U.S.1 (1936); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922)).

In cases where government action violates the the Establishment Clause by evincing favoritism toward a particular religion in a way that causes genuine injury to a member of a different faith, the injured citizen would likewise have standing. If the injury is in the form of coercion of the individual to violate the dictates of his or her conscience, he or she could assert a claim for the violation of individual rights under the Free Exercise Clause of the First Amendment.

If, on the other hand, the injury were in the form of the conferral of a benefit on citizens of one faith that was denied to citizens of other faiths or nonbelievers, the injured citizens would have a potential cause of action—based on real, direct injuries—under both the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. For instance, if the State of Arizona had enacted a law granting tax credits only to taxpayers who make contributions to religious schools, a taxpayer who had made a

contribution to a secular school would be able to show an injury-in-fact sufficient to confer standing on traditional principles—the amount of the tax credit he or she would have received if the law had been available to religious and secular donors alike. Beyond this, the legislative branch might deem it appropriate to create a specific cause of action for Establishment Clause violations under specific circumstances. *See Flast*, 392 U.S. at 131-32 (standing problem is resolved where Congress has appropriately authorized the lawsuit) (Harlan, J., dissenting).

Thus, the Court's insistence upon the application of traditional standing principles would be an invaluable tool by which the Court might ensure that only actual, legitimate claims of Establishment Clause violations are adjudicated. By simply requiring all plaintiffs to demonstrate true injuries-in-fact, the Court might substantially reduce the volume of frivolous, insubstantial Establishment Clause lawsuits that currently consume considerable judicial resources and public funds.

IV. Prudential Concerns Mitigate Against a Finding of Taxpayer Standing in Cases Such as This.

A. Respect For The Principle Of Separation Of Powers Mitigates Against Finding Taxpayer Standing In Cases Such As This.

As multiple learned judges have explained, the Court's Article III standing doctrine carries serious implications for the principle of separation of powers.

> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974). The intended function of the judiciary is not to pass on the wisdom or propriety of particular laws enacted by the representative branches of government, but rather to decide the rights of individuals in concrete cases involving real injuries. *See Marbury v. Madison*, 5 U.S. 137 (1803).

Amicus submits that where taxpayers object to a law passed by their elected representatives not because of particular injuries the taxpayers have suffered as a result of the law, but simply based on a belief that the law is wrong or imprudent, the proper remedy for those taxpayers is resort to the political process. *See Hein*, 551 U.S. at 636 (Scalia, J., dissenting) ("generalized grievances affecting the public at large have their remedy in the political process.")

B. Taxpayer Standing Analysis Should Be Applied Most Stringently Where State Legislative Actions Are Challenged.

In *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court ruled that the Establishment Clause of the First Amendment was among the rights incorporated into the Fourteenth Amendment and thereby guaranteed against state, as well as federal, violations. This "incorporation doctrine" has, at times, been criticized with respect to the Establishment Clause. *See* James J. Knicely, *"First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?*, 52 Drake L. Rev. 171 (Winter, 2004).

A middle-ground alternative to a radical de-incorporation of the Establishment Clause would be a strict adherence to traditional taxpayer standing analysis where state laws are challenged on Establishment Clause grounds. In his concurrence to the Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) Justice Thomas suggested this reasonable resolution of the issue:

> [i]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in

> religion]--on a neutral basis--than the Federal Government." Thus, while the Federal Government may "make no law respecting an establishment of religion," the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.

Id. at 678-79 (Thomas, J., concurring) (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring)).

Just as Justice Thomas suggested, *Amicus* submits that states should be afforded greater latitude than the federal government to experiment with laws that touch upon religion—particularly when those laws concern state educational prerogatives. By adhering to traditional taxpayer standing principles that dictate denial of standing in cases such as the one at bar, the Court can avoid entangling the judiciary in matters appropriately left to the wisdom of the respective states and the elected representatives who govern them.

V. Section 1089 Is Consistent With The Mandates Of The Establishment Clause.

A. This Court Has Consistently Found The Element Of Individual Autonomy Dispositive In Cases Such As This.

In analyzing whether government aid programs violate the Establishment Clause, this Court has drawn a distinction between programs that dispense aid directly to religious schools and those that empower individual recipients to designate the schools to which they wish to apply the aid.[4] This Court has described programs that fall in the latter category as evincing "true private choice." *See Zelman*, 563 U.S. at 649. Accordingly, the Ninth Circuit appropriately identified the presence or absence of "true private choice" as the key factor in determining the constitutionality of Arizona's tax credit for donations to school tuition organizations ("STOs").

In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court rejected an Establishment Clause challenge to a statute that allowed a tax deduction for educational

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[4] Arizona's Individual Income Tax Credit presents far less of a concern under the Establishment Clause than the four government programs this Court upheld in the cases cited, *infra*, in which the governments directly dispersed tuition assistance to qualifying parents. Under Arizona's program the money flowing to religious schools is, in reality, the private money of individual taxpayers.

expenses even though 96 percent of the beneficiaries of this program were parents of children attending religious schools. *Id. at* 397. Importantly, the government aid reached the religious institutions as a result of the choices made by *parents* of school-aged children. *Id.* The intervening private choices ensured that "no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally." *Id.* at 399.

Mueller makes clear that where governmental programs are neutral towards religion and provide assistance to a broad range of citizens who are able to exercise independent judgment in directing governmental aid to a school of their choice, such programs do not violate the Establishment Clause. This Court has applied this analytical framework in *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), where a scholarship program providing tuition aid to a student in a pastoral program at a religious school was found not to violate the Establishment Clause. The record there showed that the vocational assistance provided was paid directly to the student, who transmitted it to the educational institution of his or her choice; any aid provided that ultimately flowed to religious institutions did so only as a result of genuinely independent and private choices. *Witters*, 474 U.S. at 487-88. And in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), this Court upheld a federal statute that allowed state sign-language interpreters to assist deaf children enrolled at religious schools. *See Zobrest*, 509 U.S. at 10 ("[b]y according parents

freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents.").

Importantly, this Court has recognized that the percentage of government money directed toward tuition at religious compared to secular private schools is not constitutionally significant. *See Zelman*, 536 U.S. at 657. *Zelman* involved assessing the constitutionality of an Ohio statute that provided tuition grants to low income families to enable their children to attend private schools of any religious or secular orientation. *Id.* at 639. There, 82 percent of the participating private schools had a religious mission. *Id.* This Court found the Ohio statute constitutional because it did not provide direct aid to schools, was neutral toward religion, and enabled private choice. *Id.* In arriving at this determination, this Court did not deem significant the amount of aid benefiting students at religious schools. *Id.* Just as it did in *Mueller*, this Court emphasized that "when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, no reasonable observer is likely to draw from the fact . . . an inference that the state itself is endorsing a religious practice or belief." *Mitchell v. Helms*, 530 U.S. 793, 843 (2000). In *Agostini v. Felton*, 521 U.S. 203, 229 (1997), this Court similarly found that even when religious schools were the beneficiaries of the vast majority of *direct* aid from a government program, the amount of aid was still

irrelevant in determining the constitutionality of the program.

B. The Ninth Circuit Should Have Focused On The Range of Choices Available To The Taxpayer Donors Rather Than Parents.

In prior cases, where the government has made educational aid available to parents or religious schools, the Court's focus has been on the extent to which private choice intervenes to determine the ultimate recipient of the funds. In this case, however, the government is providing no funding for parents or schools. Rather, the challenged government program is the mere provision of a tax credit to individual taxpayers who choose to donate their own, private money to STOs.

Because the taxpayer donors are the recipients of the government benefit (the tax credit), the relevant inquiry is the extent to which their own, independent choices result in the funding of religious schools. Of course, as *amicus* will argue below, the wide range of STOs—both religious and secular—among which taxpayer donors are free to choose, precludes any reasonable observer from concluding that the program in question evinces religious favoritism.

C. Both Taxpayers And Parents Who Participate In Section 1089 Have A Range Of Secular And Religious Options From Which To Choose.

As this Court's jurisprudence demonstrates, the dispositive factor in determining whether a tax credit program violates the Establishment Clause is whether the program is one of true private choice. A review of Arizona's program participants in the past academic year, including both the STOs that have received funding, and the schools to which they have subsidized student attendance, reveals the true private choice that not only permeates the range of options available to taxpayers who choose to donate funds, but also characterizes the options available to parents in the type of school they desire their children to attend.

In concluding that Section 1089 could violate the Establishment Clause, the Ninth Circuit relied, in part, on the Respondents' representations that over 85 percent of the scholarships made available through STOs were for use exclusively at religious schools. *Winn*, 562 F.3d at 1017. This figure obscures the fact that in practice, however, only twenty-seven of the fifty-three STOs operating in Arizona in 2009 provided scholarships solely to religiously affiliated schools. *See* Arizona Dept. of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009, Executive Summary*, at 1, *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2009.pdf [hereinafter "Individual Income Tax Credit"].[5] An additional

[5] Although the State of Arizona Report provides that there were 53 STOs in Arizona in 2009, no data was available as to the Just Friends of Education STO. All subsequent

fifteen, or 48 percent of the STOs, provided scholarships or grants for use at secular schools, a combination of secular and religious schools,[6] or allowed the participating parent to use the scholarship to send their child to any school of their choosing.[7] Closer examination of the data indicates that the Ninth Circuit's determination was informed, at least in part, by misleading figures.

Review of the options available to, and exercised by, the taxpayers who participated in Arizona's program further reveals that the true private choice afforded to parents also extends to taxpayers. In 2009, Arizona taxpayers made 48,159 donations to STOs with religious orientations and an additional 25,228 donations to secular STOs, those that funded scholarships at both secular and religious schools, or those that provided parents with an unrestrained choice of private schools. *See* Individual Income Tax Credit. Additionally, in 2009, Arizona STOs received $50,850,485 in donations from taxpayers. *See* Individual Income Tax Credit. Of that amount, STOs that directed scholarships to strictly religious institution received $32,176,545 in donations, or 63 percent of the total dedicated funds. *See id.* In contrast, STOs that directed scholarships to secular

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statistics derived from the Arizona report are computed as if there were only 52 STOs in Arizona as of 2009. As there were only four donations by taxpayers to the Just Friends Education STO for a total of $2600, the impact on the statistical analysis is minimal. *See also* Appendix 1.

[6] *See* Appendix 2.

[7] *See* Appendix 3.

schools, secular and religious schools, or gave parents free choice in where to send their children received $18,673,940 in donations, or 37 percent of the funds generated by the tax credit. *See id.*

The Ninth Circuit's characterization of the amount of funds generated by Section 1089 for religious schools as "disproportionate" also obscures the reality of the educational landscape in Arizona, as well as the rest of the nation. As this Court observed in *Zelman* with respect to Cleveland, Arizona's "preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities." *Zelman*, 536 U.S. at 656. Indeed, the ratio of secular to religious private educational opportunities available to Arizona students comports with those across the country. Nationwide, in 2007-08, 67.9 percent of private schools, enrolling 80.6 percent of private school students, had a religious orientation or purpose.[8] An analogous percentage of Arizona private schools receiving money from STOs under Section 1089 had a religious orientation or purpose.[9] Thus, contrary to the Ninth Circuit's view

[8] U.S. Dept. of Ed., National Center for Education Statistics, *Private School Universe Survey: 2007-2008*, at 2 (NCES 2009).

[9] In 2009, Arizona STOs provided grants and scholarships to 370 Arizona private schools. *Id.* Of these schools, 276 have a religious affiliation, *See Appendix 4*, while the remaining 92 are secular. *See Appendix 5*. On the whole, approximately 25 percent of the schools for which STOs in

that Arizona's tax credit program "does not equally permit the participation of all schools... religious or nonreligious," the diverse orientation of the participating STOs and the schools to which they provide scholarships gives both parents and taxpayers an undeniable true private choice.

Moreover, Section 1089 conforms with a trend of increased participation in this type of educational tax credit program throughout the country. Arizona is among seventeen states that have enacted or proposed statutes devised to provide increased access to educational opportunities. *See* Brief of States of Michigan, Florida, Indiana, Louisiana, New Jersey, Pennsylvania, South Carolina, and Utah as Amici Curiae Supporting Petitioner at 1, *Garriott v. Winn*, No. 09-991 (U.S. Mar. 25, 2010). States that have instituted such programs have experienced an upsurge in donations and scholarships over the course of the programs' existence. *See, e.g.* Alliance for School Choice, *Corporate and Individual Scholarship Tax Credit Programs: The Facts about School Choice*, available at: http://www.allianceforschoolchoice.org/UploadedFiles/ResearchResources/CorpIndivScholTaxCreditProgs_04172009.pdf. Pennsylvania, for example, awarded 17,350 scholarships in the first year of its tax

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Arizona provided scholarship money have a secular mission, while the other 75 percent have some religious affiliation or orientation. *See id.*

program, 2001-02. By 2007-2008, 43,764 students had received scholarship money generated by the tax credit. *See id.* This trend, which holds across geographic regions and state size, detracts from the Ninth Circuit's endorsement of the Respondents' characterization of Arizona's program as established exclusively to advance the Arizona legislature's religious agenda.

CONCLUSION

Under this Court's taxpayer standing precedents, even including *Flast*, the taxpayer Respondents before the Court cannot demonstrate standing to challenge Section 1089. This is because even the sort of legal fiction devised in *Flast* cannot convert Respondents' grievance about the law's grant of tax credits to taxpayers not before the Court into a direct, personal injury to Respondents themselves. Taxpayers have no money at stake in the challenged Arizona program. Perhaps more so than any other taxpayer standing case considered by this Court, Respondents' so-called "injury" is a generalized grievance regarding the operation of government. As such, it is properly left to the political process.

Moreover, in light of the legal and logical inadequacies of the *Flast* two-pronged nexus test and the continued judicial confusion that has resulted from it, *amicus* respectfully requests that the Court either clearly explain the doctrine, re-work the analysis, or overrule *Flast* entirely. As *amicus* has outlined herein, the interests of the Establishment Clause do not require the *Flast* relaxation of the

Court's taxpayer standing doctrine. In fact, the true and noble purpose of the Establishment Clause is merely obscured by a doctrine that ushers insubstantial and historically laughable grievances through the gates of Article III standing requirements and into the federal courtroom.

Finally, the Ninth Circuit erred in its consideration of Respondents' substantive arguments regarding Section 1089 and Arizona's STO program. Section 1089 provides both parents and donating taxpayers with true private choice, and, when viewed in its proper context, Section 1089 fully comports with the Establishment Clause. This is demonstrated by a review of the scholarships made available through STOs, as well as the wide range of STOs from which to choose. The Ninth Circuit therefore erred in endorsing Respondents' characterization of Arizona's program as advancing the alleged religious agenda of the Arizona legislature.

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Nos. 09-987, 09-991

In The Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, ET AL.,
Petitioners,

v.

KATHLEEN M. WINN, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX

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APPENDIX 1
Arizona STOs

Arizona Adventist Scholarships, http://www.azadventistscholarships.com/; Arizona Christian School Tuition Organization, http://acsto.org/; Arizona Episcopal Schools Foundation, https://tungsten.liquidweb.com/~azepisco/about.php; Arizona International Academy Scholarship Fund, http://www.arizonainternationalacademy.com/AZStateTax-CreditScholarshipProgram.html; Arizona Lutheran Scholarship Organization, http://church.rsles.org/wp/wp-content/uploads/2009/08/ALSO-2009-2010-scholarship-application.pdf; Arizona Tuition Organization, http://azto.org/; BEST Student Fund, http://www.tempemosque.com/taxcredit/BSF_PMIS.php; Catholic Tuition Organization of the Diocese of Phoenix, http://www.catholictuition.org/; Catholic Tuition Organization for the Diocese of Tucson, www.ctso-tucson.org; Chabad Tuition Organization, http://www.chabadaz.com/templates/articlecco_cdo/AID/105378, Chaparral Mission Scholarship Fund, http://www.aicm.org/ArizonaTaxCredit.htm; Cheder Scholarship Organization, http://www.cheder.org/; Children's Scholarship Network of Arizona, http://www.csnaz.org/; Christ Lutheran School Foundation, http://www.clsphx.org/foundation.asp; Christian Scholarship Foundation, http://csfinc.org/; Christian Scholarship Fund of Arizona, http://www.pcssf.org/; Cochise Christian School Tuition Organization,

http://www.gracechapelbenson.org/SchoolCCSTO_DonationForm.htm; Foundation for Lutherans Interested in Funding Education, http://shephardaz.org/school2/Education%20Foundation%20Application.pdf; Higher Education for Lutheran Program, http://www.helpfoundationonline.org/; Jewish Tuition Organization, www.jtophoenix.org; Lutheran Education Foundation, www.lutheraneducationfoundation.com; Northern Arizona Christian School Scholarship Fund, http://www.cvucs.org/id4.html; School Tuition Association of Yuma, www.azstay.org; Shepherd of the Desert Foundation, http://www.sotdaz.org/562618.ihtml; Valley Lutheran Scholarship Organization, http://www.vlhs.org/Give/taxcredit.html; VVBC Christian Education Fund, http://starpas.cc.state.az.us/scripts/cgiip.exe/WService=wsbroker1/corp-detail.p?name-id=08759825; White Mountain Tuition Support Foundation, http://www.saintanthonycatholicschool.org/Fundraisers.html

APPENDIX 2
Arizona STOs Providing Scholarships To Secular, or Secular And Religious, Schools

Alternative Schools Scholarship Fund, http://www.taxexemptworld.com/organization.asp?tn=1232660; Arizona Independent Schools Scholarship Foundation, http://www.aissf.org/; Arizona Native Scholastic & Enrichment Resources, http://www.implu.com/nonprofit/860928681; Arizona Waldorf Scholarship Fund, http://www.tucsonwaldorf.org/Development_Tax_Credit.html; Dynamite Montessori Foundation, http://www.docstoc.com/docs/47478965/Arizona-Income-Tax-Forms; Foundation for Montessori Scholarships, http://montessoriaz.info/; Life Development Institute Education Foundation, http://lifedevelopmentinstitute.org/docs/supportLdi/ldi_education_fund.pdf; Montessori Centre School Tuition Organization, http://www.montessoriinthepark.org/taxcredit.cfm; Montessori Scholarship Organization, http://montessorifoundation.org/scholarships.htm; New Valley Education Partners, http://www.nvep.org/vvs.html; Orme Primavera Schools Foundation, http://www.ormeprimaveraschoolsfoundation.org/; Pinetop Tuition Support Organization, http://www.whitemountainmontessori.org/documents/newsletters/WMMS-Newsletter-Dec08.pdf; Schools With Heart Foundation, http://www.desertviewlearningcenter.net/foundation.html.

APPENDIX 3
Arizona STOs Allowing Parents "Free Choice"

Arizona Private Education Scholarship Fund, http://www.apesf.org/; Arizona Scholarship Fund, https://www.azscholarships.org/; Arizona School Choice Trust, http://www.asct.org/index.asp; Brophy Community Foundation, www.brophyfoundation.org; Flagstaff Scholarship Fund, http://www.taxexemptworld.com/organization.asp?tn=1234753; Institute for Better Education, www.ibescholarships.org; Tuition Organization for Private Schools, www.topsforkids.com; Maricopa County Schoolhouse Foundation, http://www.mcschoolhousefoundation.org/; School Choice Arizona, http://www.schoolchoicearizona.org.

APPENDIX 4
Religiously-Affiliated Private Schools

91st Psalms Christian School, http://www.greatschools.org/arizona/phoenix/2404-91st-Psalm-Christian-School/, Abbie Loveland Tuller, http://www.tullerschool.com/, Abiding Savior School, http://abidingsavior.com/, Adobe Adventist Christian School, http://adobe22.adventistschoolconnect.org/; Aletheia Classical Christian School, http://maps.google.com/maps/place?hl=en&rls=com.microsoft:en-us&um=1&ie=UTF-8&q=Aletheia+Classical+Christian+School+arizona&fb=1&gl=us&hq=Aletheia+Classical+Christian+School&hnear=Arizona&cid=34051976362809215O6, Al-Huda School, http://www.alhuda.org/, All Saints Catholic School, http://ascsaz.org/Home.htm; All Saints Episcopal Day School, http://www.allsaints-phoenix.org/; American Indian Christian School, http://www.aicm.org/; Annunciation Catholic School, http://acsphx.info/; Apostolic Faith Center Christian Academy, http://www.patheos.com/directory/show/AZ/Peoria/Apostolic_Faith_Center/559909; Arizona Cultural Academy, http://www.azacademy.org/; Arizona International Academy, http://www.arizonainternationalacademy.com/; Arizona Lutheran Academy, http://www.alacoyotes.org/; Arrowhead Christian Academy, http://www.acaeagles.org/cms/; Ascension Lutheran School, http://www.ascensionschool.org/; Atonement Lutheran School, http://www.atonementlutheranschool.org/, Barness

Family East Valley Jewish Community Center Day School, http://evjds.org/; Beautiful Savior Academy, http://beautifulsavior.net/; Bethany Christian Schools (Lake Havasu), http://www.bethanyhavasu.com/; Bethany Christian School (Tempe), http://www.bethanychristianschool.org/; Bethany Learning Center, http://www.blcforjesus.org/templates/System/default.asp?id=48569; Bios Christian Academy, http://www.bioschristianacademy.org/; Blessed Sacrament Kindergarten, http://www.blessedsacramentscotts.org/school/index.htm; Bourgade Catholic High School, http://www.bourgadecatholic.org/; Brophy College Preparatory, http://www.brophyprep.org/aca/about.html; Calvary Baptist School, http://www.greatschools.org/arizona/yuma/2384-Calvary-Baptist-School/; Calvary Chapel Christian School, http://www.calvarytucson.org/cccs; Calvary Christian Academy (Lake Havasu City), http://sites.google.com/site/calvarychristianacademylhc/; Calvary Christian Academy (Tempe), http://www.greatschools.org/arizona/tempe/3198-Calvary-Academy/; Calvary Christian School (Queen Creek), http://www.ccsqcaz.org/; Camelback Christian School, http://www.camelbackchristianschool.org/; Camelback Desert School (Paradise Valley), http://www.education.com/schoolfinder/us/arizona/paradise-valley/camel-back-desert-school/; Camp Verde United Christian School, http://www.cvucs.org/;

Carden Christian Academy, http://www.cardenchristian.com/; Casas Christian School, http://www.casaschristianschool.com/; Cathedral of Praise Christian School, http://www.cathedralofpraisechurch.com/; Chandler Christian School, http://www.chandlerchristianschool.org/; Chaparral Church Kindergarten, http://www.ccpk.info/; Chapel in the Hills, http://chapelinthehillsschool.webs.com/; Chinle Adventist Elementary School, http://www.greatschools.org/arizona/chinle/2385-Chinle-SDA-School/; Christ Church School, http://ccsaz.org/; Christ Greenfield Lutheran School, http://www.cglschool.org/; Christ Lutheran School, http://www.clsphx.org/; Christ the King Academy, http://www.greatschools.org/arizona/phoenix/3217-Christ-The-King-Academy/; Christ the King Catholic School, http://www.ctk-catholicschool.org/; Christ the Redeemer Lutheran, http://www.ctrlutheran.org/Index.asp?PageID=6459; Christian Academy of Prescott, http://www.cap-prescott.com/; Congregation Anshei Israel, http://www.caiaz.org/education.htm; Copper Canyon Christian School, https://www.topsforkids.com/index.aspx?c=60; Cornerstone Christian Academy (Chandler), http://www.cfcsmain.com/about-us; Cornerstone Christian Academy (Cottonwood), http://www.privateschoolreview.com/school_ov/school_id/543; Cornerstone Christian Academy (Tuscon), http://www.cfcsmain.com/; Cornerstone Kidz, http://www.cornerstonekidz.org/; Covenant Child Care Center, http://www.cccckids.com/; Cross of

Glory Lutheran School, http://www.crossofglory.org/; Crossroads Community School, http://www.crcsonline.com/; Desert Christian Schools, http://www.desertchristianschools.org/; Desert Valley Christian School, http://www.desert23.adventistschoolconnect.org/; Dove Christian School, http://www.greatschools.org/arizona/tucson/2412-Dove-Christian-School/; East Fork Lutheran School, http://www.eastforkschool.com/; East Valley Christian Academy, http://www.privateschoolreview.com/school_ov/school_id/540; Emmanuel Christian Academy, http://ecakingman.org/default.aspx; Emmanuel Evangelical Lutheran School, http://www.elctempe.org/; Emmaus Lutheran School, http://www.emmauslutheran.com/; Faith Christian School, http://www.faith-christian.org/; Faith Community Academy, http://www.fcatucson.org/; Faith Lutheran School, http://www.faith-lutheran.org/; Family Life Academy, http://www.ccctucson.org/information.asp?topicid=25; Family of God Lutheran School, http://www.usachurches.org/church/family-of-god-lutheran-church.htm; Fellowship Children's Development Center, http://fcanthem.com/#/preschool; Firm Foundations, http://www.trulia.com/schools/AZ-Tucson/Firm_Foundations_Christian_School/1; First Baptist Christian Academy, http://www.sierravistafirst.org/templates/System/details.asp?id=32660&PID=293917; First Southern Christian School,

http://fsbctucson.net/templates/System/details.asp?id=41698&PID=569498; Flagstaff Community Christian School, http://www.flagstaffcommunitychristian.org/; Florence Baptist Academy, http://www.florencebaptistchurch.com/school.htm; Fountain of Life Lutheran School, http://follutheran.org/; Freedom Christian Academy, http://www.freedomca.org/; Freedom Christian School (Arizona City), http://www.christianschoolnetwork.com/arizona-christian-schools.html; Gateway Baptist Academy, http://www.mygba.org/; Gethsemane Lutheran School, http://www.glstempe.com/; Gilbert Christian Schools, http://gilbertchristianschools.org/; Gilson Wash Baptist School, https://www.topsforkids.com/index.aspx?c=60; Glendale Christian Academy, http://www.taxexemptworld.com/organization.asp?tn=1746781; Glenview Adventist School, http://www.glenviewadventistacademy.org/; Good Shepherd Lutheran School, http://maps.google.com/maps/place?rls=com.m rosoft:en-us&oe=UTF-8&um=1&ie=UTF-8&q=Good+Shepherd+Lutheran+School+arizona&fb=1&gl=us&hq=Good+Shepherd+Lutheran+School&hnear=Arizona&cid=18053680324172300788; Gospel Light Christian Academy, http://www.gospellightmesa.com/about_us.html; Grace Christian School, http://www.independentschools.com/arizona/grace-christian-school_27156.html; Grace Community Christian School, http://www.gccsaz.org/; Grace

Fellowship Academy, http://gracefellowshipacademy.org/; Grace Lutheran School, http://www.graceglendale.org/site/default.asp?sec_id=180004029; Guiding Light Christian Partnership, http://www.glccc.org/index.html; Guiding Light School, http://www.fccphx.com/#/grow/guiding-light-school; Hand in Hand Christian School, http://www.azstay.org/default.asp?tab=Schools; Harvest Christian Academy, http://www.sonoitaelginchamber.org/members.htm; Heritage Christian Academy, http://www.hcapatriots.org/; Holbrook Indian School, http://www.hissda.org/; Holy Angel School, http://www.holyangelscatholiccommunity.org/School.htm; Holy Cross Evangelical Lutheran School, http://phoenixlutheran.org/; Holy Trinity Academy, http://www.holytrinityacademyphx.net/; Hopi Mission School, http://kansasvirtualtours.com/hopimissionfoundation/; Immaculate Conception School, http://www.greatschools.org/arizona/yuma/2210-Immaculate-Conception-Elementary-School/; Immaculate Heart Schools, http://www.immaculateheartschool.com/s/365/splash.aspx; International Christian Academy Online, http://www.icacademyonline.com/; Jess Schwartz Jewish Community High School, http://www.jewishinphoenix.com/Jess-Schwartz-Jewish-Community-High-School-The.html; Joanne Todd Christian School, http://www.facebook.com/pages/Willcox-AZ/Joanne-Todd-Christian-School/115976461760231; Joy

Community Christian School, http://www.joyonline.org/jcs/index.php; Joyful Beginnings Academy, http://www.joyfulbeginningsacademy.webs.com/; King David School, http://www.thekingdavidschool.org/; Lamad Preparatory Academy, http://www.lwmaz.org/lamad/lamad_main.asp; Lamb's Gate Kindergarten, http://www.lambsgate.org/preschool.html; Legacy Classical Christian Academy, http://www.legacyclassicalchristian.org/; Lestonnac Kindergarten, http://www.privateschoolreview.com/school_ov/school_id/608; ; Logos Academy, http://www.logosclassical.com/; Loretto School, http://www.lorettoschool.org/; Lourdes Catholic School, http://www.lcsnogales.org/; Maranatha Christian Academy, http://www.thecityoftucson.com/churches/church-christian.html; Maricopa Village Christian School, http://www.stopshox.com/maricopavillage/; Martin Luther School, http://members.cox.net/martinlutherschool/; Mission Christian School, http://www.mcssoldiers.org/; Mission View Academy, http://www.missionview.net/; Montessori Christian Academy, http://www.montessorichristianacademy.org/; Most Holy Trinity Catholic School, http://www.mht.org/; Mount Calvary Lutheran School, http://mtcalvaryflagstaff.org/; Mountain Christian School, http://www.mcsaz.org/; Navajo Lutheran Mission School, http://www.nelm.org/school.htm;

Nehemiah Ministries, http://www.discoverfoundations.com/; New Covenant Child Development, http://www.newcovenantaz.org/preschool_about.php; Noah's Ark Kindergarten, http://www.noahsarkpreandk.org/view/?pageID=312812; Nogales Christian Academy, http://open-ednet.org/nca.htm; North Phoenix Baptist Kindergarten, http://www.npbc.org/; North Valley Christian Academy, http://northvalleyca.org/; Northminster Christian School, http://acsto.org/schoollist.asp; Northwest Christian School, http://www.northwestchristianschool.org/; Notre Dame Preparatory High School, http://www.notredamepreparatory.org/; Our Lady of Guadalupe, http://www.ourladyofguadalupeparish.com/English/E-School.html; Our Lady of Joy School, http://www.oloj.org/; Our Lady of Mount Carmel School, http://www.olmcschool.info/; Our Lady of Perpetual Help School (Glendale), http://www.olph.com/; Our Lady of Perpetual Help School (Scottsdale), http://www.olphaz.com/school/; Our Lady of Sorrows Academy, http://www.sspx.org/schools.html; Our Mother of Sorrows, http://www.omosschool.com/; Our Savior's Lutheran School, http://home.earthlink.net/~oursaviorswels/index.html; Our Saviour Lutheran School, http://havasulutherans.com/school-2/; Page Christian School, http://www.lakepowellnazarene.com/; Palms Elementary, http://www.palmschristianschool.com/; Paradise for Tots Christian Kindergarten,

http://localarizonaschools.com/schools/Phoenix.html; Pardes Jewish Day School, http://www.pardesschool.org/; Parker Apostolic Christian School, http://www.apostolicchristian.org/congregations.php?id=; Parkway Children's School of Excellence, http://www.parkwayschool.com/Parkway_School/Home.html; Payson Community Christian School, http://www.paysoncommunitychristianschool.org/; Peridot Lutheran School, http://www.privateschoolreview.com/school_ov/school_id/648; Phillips Christian School, http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2006.pdf; Phoenix Christian School K-8, http://www.phoenixchristianschool.org/; Phoenix Christian Unified, http://www.phoenixchristian.org/; Phoenix Christian Unified Elementary (Goodyear), http://www.phoenixchristian.org/; Phoenix Hebrew Academy, http://www.phoenixhebrewacademy.org/; Phoenix Metro Islamic School, http://pmistempe.com/; Pilgrim Lutheran School, http://www.pilgrimmesa.com/; Pleasantview Christian Elementary, http://www.pleasantviewbc.com/; Pope John XXIII Catholic School, http://www.popejohnxxiii.org/; Precious Lamb Christian School, http://www.preciouslambchristianschool.com/; Prescott Adventist School, http://maps.google.com/maps/place?rls=com.microsoft:en-us&oe=UTF-8&um=1&ie=UTF-8&q=Prescott+Adventist+School,&fb=1&gl=us&hq=Adventist+School,&hnear=Prescott,+AZ&cid=765927

2253092782511; Providence Classical School, http://www.providenceclassical.com/; Pusch Ridge Christian Academy, http://cfcsmain.com/; Queen of Peace School, http://www.qop.org/; Red Rock Christian School, http://www.adventistdirectory.org/viewEntity.aspx?EntityID=30497; Redeemer Christian Academy, http://www.redeemerministries.com/index.php?page=24, Redeemer Christian School, http://www.redeemerchristianschool.org/Home.html; Redeemer Lutheran School, http://www.greatschools.org/arizona/tucson/2280-Redeemer-Lutheran-School/; Resurrection Lutheran Child Development Center, http://www.orovalley.org/; Risen Savior Lutheran School, http://www.rslcs.org/; River of Life Christian Academy, http://www.tucsonriveroflife.com/; Sacred Heart School (Nogales), http://www.trulia.com/schools/AZ-Nogales/Sacred_Heart_Catholic_School/; Sacred Heart School (Prescott), http://www.sacredhearteducation.com/; Safford Adventist Christian School, http://www.education.com/schoolfinder/us/arizona/thatcher/safford-sda-school/environment/; Safford Christian School, http://www.privateschoolreview.com/school_ov/school_id/734; Saguaro Hills Adventist Christian School, http://www.education.com/schoolfinder/us/arizona/tucson/saguaro-hills-adventist-christian-school/; Saguaro Hills Christian School, http://www.shbcaz.org/; Sahuarita Christian Academy, http://www.sahuarita-sca.org/; Salpointe Catholic High School,

http://www.salpointe.org/Page.aspx?pid=205; San Francisco di Asis, http://www.diocesephoenix.org/parish/sfda/schoolhome.htm; San Miguel Catholic High School, http://www.sanmiguelhigh.org/WS3/index.php; San Xavier Indian School, http://www.sanxaviermission.org/; Santa Cruz Catholic School, http://www.greatschools.org/arizona/tucson/2204-Santa-Cruz-Catholic-School/; Scottsdale Christian Academy, http://www.scottsdalechristian.org/; Scottsdale United Methodist Kindergarten, http://www.privateschoolreview.com/school_ov/school_id/818; Seton Catholic High School, http://www.setoncatholic.org/; Shalom Montessori School, http://www.shalommontessori.org/; Shearim Torah High School, http://www.shearimhighschool.org/Home.html; Sheila's Christian Academy, http://www.sheilasacademy.com/; Shepherd of the Desert Lutheran School, http://www.sotdaz.org/; Shiloh Christian School, http://www.shilohcm.org/; Sonshine Christian School, http://www.sonshinechristian.com/; Southwest Christian School, http://www.swchristianschool.org/; Southwestern Christian School, http://www.privateschoolreview.com/school_ov/school_id/689; Spirit of Hope Montessori School, http://www.spiritofhope-umc.org/; SS Peter & Paul Catholic School, http://www.sspptucson.org/; SS Simon & Jude Catholic School, http://www.simonjude.net/; St Agnes Catholic School, http://www.stagnesphx.org/school/; St Alban's

Kindergarten, http://www.stalbanspreschool.com/; St Ambrose Catholic School, http://www.stambrosetucson.org/; St Andrews Presbyterian Pre-School & Kindergarten, http://www.standrewspres.com/; St Anthony of Padua School, http://www.stanthonypaduaschool.org/; St. Anthony (Pinetop), http://www.saintanthonycatholicschool.org/; St. Anthony (Show Low), http://www.saintanthonycatholicschool.org/; St Augustine High School, http://staugustinehigh.com/; St Catherine of Siena School, http://www.diocesephoenix.org/school/st_catherine_school/; St Charles Apache School, http://www.stcharlesindianschool.com/; St Cyril's Catholic School, http://www.stcyril.com/; St Daniel the Prophet School, http://www.sdtp.net/; St. Dominic Savio Academy, http://www.stdomsavio.com/about-sdsa/faq; St Elizabeth Ann Seton, http://seas.seastucson.org/; St Francis of Assisi School, http://www.greatschools.org/arizona/yuma/2211-St.-Francis-Of-Assisi-School/; St Francis Xavier Elementary School, http://www.greatschools.org/arizona/yuma/2211-St.-Francis-Of-Assisi-School/; St Gregory Catholic School, http://www.st-gregory.com/; St Gregory College Prep, http://www.stgregoryschool.org/, St Jerome K-8 School, http://stjeromeaz.com/index.asp; St John Bosco School, http://www.sjbosco.org/; St John the Evangelist, http://www.stjohnndaa.org/; St John Vianney Catholic School, http://www.school.sjvaz.net/; St Joseph's Catholic

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APPENDIX 5
Secular Private Schools

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http://www.greenfields.org/?page=HeadMessage; Heritage Montessori, http://heritagemontessorischool.org/; Highland Free School , http://highlandfreeschool.org/?page_id=2; Howard S. Gray Education Center, http://www.bannerhealth.com/Locations/Arizona/Banner+Behavioral+Health/Howard+S+Gray/_Howard+S+Gray+School.htm; Imago Dei Middle School, http://www.imagodeischool.org/index.php?option=com_content&view=article&id=5&Itemid=9; International School of Arizona, http://www.isaz.org/; International School of Tucson, http://internationalschooloftucson.org/; Journeys Academy, http://www.journeysacademy.com/faq.htm; Keystone Montessori, http://www.keystonemontessori.com/; Khalsa Montessori School, http://khalsamontessori.org/; Kino Learning Center, http://www.kinoschool.org/philosophy/what/; Lauren's Institute for Education, http://www.laurensinstitute.org/aboutus/default.html ; Life Development Institute, http://www.lifedevelopmentinstitute.org/; Mesa Montessori, http://www.mesamontessori.com/; Millennium Worldwide Academy, http://www.appal-mwa.org/; Mission Montessori School, http://www.missionmontessori.com/; Montessori Center School, http://www.montessoricenterschool.com/; Montessori Children House, http://www.phxchildrenshouse.com/; Montessori Day School, http://www.mdpsc.org/, Montessori Educare Academy, http://www.montessori-educare.com/; Montessori in

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 5 - 2010
OFFICE OF THE CLERK

Nos. 09-987, 09-991

In the Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, ET AL., *Respondents.*

GALE GARRIOTT, DIRECTOR,
ARIZONA DEPARTMENT OF REVENUE, *Petitioner,*

v.

KATHLEEN M. WINN, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF *AMICI CURIAE*[1]

The **United States Conference of Catholic Bishops** ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The **Union of Orthodox Jewish Congregations of America** ("UOJCA") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. Founded in 1898, it is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the UOJCA advocates legal and public policy positions on behalf of the Orthodox Jewish community.

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[1] Pursuant to this Court's Rule 37, *amici curiae* have obtained the parties' consent to the filing of this brief, and the consent letters are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

The American Orthodox Jewish community has flourished because of the religious liberties guaranteed by the First Amendment and, by virtue of those liberties and others, our community's ability to found and foster Jewish schools in which we educate our children to be proud Americans and committed and knowledgeable Jews. Thus, this case is critical to the welfare of the American Jewish community.

The **Center for Arizona Policy** is a nonprofit, public policy and legal organization dedicated to promoting and defending the institution of the family as the primary element of civil society. The Center supports public policy that recognizes the fundamental right of parents to direct the education and upbringing of their children. The Center also supports public policy that expands the educational options available to parents. To this end, the Center has worked to support and enhance the program that is the subject of this litigation when it has been considered by the Arizona Legislature.

The **Council for Christian Colleges & Universities** ("CCCU") is an international association of intentionally Christian colleges and universities. Founded in 1976 with 38 members, the CCCU has grown to 110 members in North America and 75 affiliate institutions in 24 countries. The CCCU represents over 300,000 students and over 1.5 million alumni. CCCU's mission is: "[t]o advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth." Among its many programs, CCCU provides semester

long educational courses for students of its member institutions, including eight year round study abroad programs in seven different countries along with four specialized studies programs in the United States.

The **Association for Biblical Higher Education**, a national accrediting association officially recognized by the United States Department of Education, is comprised of approximately 125 postsecondary institutions throughout North America, with an aggregate enrollment of over 35,000 students. Founded in 1947, the Association specializes in biblical ministry formation and professional leadership education, with its purposes to promote excellence and cooperation among its member institutions and to promote the distinctive of biblical higher education to the educational community, the church and society.

Christian Legal Society ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. The Society's legal advocacy and information division, the Center for Law & Religious Freedom, works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will and because the founding instrument of this nation acknowledges

as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

While representing diverse views on issues of doctrine and policy, and indeed at times disagreeing on such issues, *amici curiae* come together because the Arizona program at issue in this case is not only entirely constitutionally permissible, but also a sound attempt to provide Arizona families with a variety of educational options from which to choose a school that best suits the needs of the individual child.

SUMMARY OF ARGUMENT

This case involves a state program, religion-neutral in its terms, under which private individuals receive a tax credit for contributing to private student tuition organizations (STOs) that in turn use the money to provide scholarships at private schools of the STOs' choice; families choosing those schools may then apply for the scholarships. At each step, the decision to direct resources toward a particular private school is made by private individuals or private STOs. The program, therefore, is one of "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). With respect to such a private-choice program, this Court has repeatedly held that the fact that benefits ultimately reach religious schools creates no Establishment Clause issue. *Id.*;

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993); *Witters v. Dept. of Servs.*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). Nor, as these decisions make clear, does it matter what percentage of the benefits are used at religious schools, since the choices that produce that result are private rather than state action.

The court of appeals in this case nevertheless held that the Arizona program violates the Establishment Clause if (as is undisputed) 85 percent of the scholarships available under the program were for places at religious schools. This ruling, as we will show, disregards every major principle of the "true private choice" approach articulated from *Mueller* through *Zelman*.

Before *amici* turn to the court of appeals' missteps here, we want to place the "private choice" approach in broader context. That approach is not simply a principle for cases about "indirect aid" to religious schools or other religious institutions. Government respect for the voluntary choices of private parties in matters of religion embodies the most fundamental goal of the Religion Clauses as a whole. It minimizes government influence over religious decisions, and it specifies the way in which government action should be neutral toward religion: it should be "substantively neutral," in the sense of minimizing government-created incentives either for or against religious practice. This overall approach also draws together much of this Court's jurisprudence in major categories of Religion Clause cases. It explains, for example, why the Court has permitted programs of even-handed aid benefiting

private religious institutions but has simultaneously kept strong Establishment Clause limits on government's own religious speech. It also explains when government should treat religion equally with other activities, and when government may and should give distinctive accommodation to private religious exercise. We urge the Court to treat protection of private religious choice as a touchstone for the Religion Clauses generally.

The court of appeals' decision is utterly at odds with the governing private-choice approach of *Zelman*, *Mueller*, and other decisions. The court below reasoned that, "from the perspective of parents" (Pet. App. 31a),[2] the program was not religiously neutral and did not offer genuine choice, because most of the available scholarships were at religious schools. This violates the private-choice approach in two ways. First, the court below refused to give effect to the fact that taxpayers' decisions to contribute to STOs, and STOs' decisions to fund religious schools, are likewise fully private choices. The supply of private-school options was equally constrained in *Zelman* by private choices, and this Court has repeatedly made clear that a standard for constitutionality that turns on shifting percentages of private choices is impossible to administer. It is also inconsistent with constitutional tradition, which respects voluntary initiatives to form and support religious institutions as well as voluntary choices to attend them.

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[2] Hereinafter all references to "Pet. App." are to the appendix to the petition in *ACSTO v. Winn*, No. 09-987.

Second, in focusing solely on the percentage of private schools in the program that were religious, the Court utterly failed to follow *Zelman* and consider the public schools that the state already funds outside the program. *See Zelman*, 536 U.S. at 655-56 (the question of coercion and choice "must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school") (emphasis in original). When the public schools are included in the calculation, of course, parents in Arizona have multiple secular options. The ordinary public schools should count as genuine options, but Arizona (like Ohio in *Zelman*) also provides a variety of public-school choices, including charter and magnet schools. Recognizing the public schools as a secular option reflects a vital point. In the absence of state assistance for private schools, the state funds only one, secular category: public schools. Private-school aid increases the range of choices, and thus it is perverse to invalidate such an aid program—as the panel did here—on the ground that the extra choices it offers have (because of private choice) some limits.

ARGUMENT

I. The Test Of *Zelman v. Simmons-Harris* And Other Cases, Permitting Government Aid Programs That Facilitate Private Choice Concerning Religion, Governs This Case And Also Embodies The Most Fundamental Goal Of The Religion Clauses As A Whole.

A. The Test of "True Private Choice," from Numerous Decisions Culminating in *Zelman*, Governs This Case.

The court of appeals correctly recognized that "Section 1089 is an indirect aid program, under which the state gives tax credits to individuals who contribute to STOs, which in turn use the money to provide private school scholarships" (Pet. App. 20a), and that this case therefore is governed by the principles of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and decisions leading up to it. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Dept. of Servs.*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). These decisions all hold that the Establishment Clause permits the inclusion of religious schools in aid "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citing *Mueller*, *Witters*, and *Zobrest*).

Zelman, which upheld Ohio's voucher program for students in Cleveland's public school system, sets out the features that make a program one of true

private choice. First, such a program gives aid "to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing." *Id.* at 649. Second, the program's terms are "neutral with respect to religion," *id.* at 652, so that it creates "no 'financial incentive[s]' that 'ske[w]' the program toward religious schools." *Id.* at 653 (brackets in original) (quoting *Witters*, 474 U.S. at 487-88); *see id.* at 650 (tax deduction in *Mueller* was upheld because there was "no evidence that the State deliberately skewed incentives toward religious schools"). Finally, in a case of true private choice there are "genuine opportunities for [ ] parents to select secular educational options." *Zelman*, 536 U.S. at 655.

In such cases, when an individual chooses to channel aid to a religious school, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652. That is, "any aid ultimately flowing to" a religious institution does not "result[] from a *state* action sponsoring or subsidizing religion," but from a private action. *Witters*, 474 U.S. at 488 (emphasis in original). "[T]he circuit between government and religion [i]s broken, and the Establishment Clause [i]s not implicated." *Zelman*, 536 U.S. at 652. Thus, there is a "close relationship between [the neutrality] rule, incentives, and private choice. For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly 'independent.'" *Mitchell v. Helms*, 530 U.S.

793, 814 (2000) (Thomas, J., for four justices) (quoting *Witters*, 474 U.S. at 487).

In Part II *infra*, we discuss why Arizona's program of tax credits for contributions to organizations funding scholarships at private religious schools is unquestionably a program of true private choice. The court of appeals panel held that it was not, but its effort to distinguish *Zelman* and other private-choice decisions is utterly meritless. *See infra* pp. 21-35. Before turning to the specifics of this case, however, we wish to put this case in larger context. The principle of private choice is fundamental to the Religion Clauses as a whole.

B. Government Respect for Private Choice in Religious Matters—or Substantive Neutrality toward Religion—Is the Most Fundamental Goal of the Religion Clauses.

Respecting the voluntary choices of private parties in matters of religion is not simply a principle for cases about "indirect aid" to religious schools or other religious institutions. The principle embodies the most fundamental goal of the Religion Clauses as a whole, and it draws together much of this Court's jurisprudence in major categories of cases under the clauses.

The ultimate goal of the Constitution's provisions on religion is religious liberty for all—for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and

agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people. The ultimate goal is that every American should be free to hold his or her own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence. The fundamental principle to achieve that goal is for the government to maintain "substantive neutrality" toward religion:

> [S]ubstantive neutrality [means] this: the Religion Clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.... [R]eligion [should] be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice. The goal of maximum religious liberty can help identify the

> baseline from which to measure encouragement and discouragement.

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-1002 (1990).

Put differently, the goal of the Religion Clauses is that religion in America should flourish or decline, not according to whether government promotes or hinders it, but "according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).[3] This formulation restates the principle of private choice, as Justice Brennan once summarized:

> Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations, and that each sect is entitled to "flourish according to the zeal of its adherents and the appeal of its dogma."

McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) (quoting *Zorach*; footnote omitted).

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[3] The Court has later quoted this formulation in decisions from *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), to *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 382 (1985), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203, 235 (1997).

The principle that religion should succeed according to individuals' zeal, without government interference or promotion, finds expression throughout our history. For example, James Madison complained that defenders of establishments, who sought state favoritism for Christianity, showed an unwillingness "to trust [the faith] to its own merits." Memorial and Remonstrance Against Religious Assessments, ¶ 6 (1785), quoted in *Everson v. Board of Education*, 330 U.S. 1, 63, 67 (1947) (appendix to opinion of Rutledge, J., dissenting). Conversely, the elimination of state favoritism for established churches in the early Republic, as many historians emphasize, helped unleash a wave of religious energy, largely in the form of "voluntary societies" that founded and expanded churches, colleges, and other educational institutions, and humanitarian and social-reform programs. *See, e.g.*, Winthrop S. Hudson, *Religion in America* 143 (4th ed. 1987); Mark A. Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* 197-98 (2002); Robert Baird, *Religion in America* 286-92 (1844) (Arno Press reprint 1969). The elimination of financial favoritism by the state—the adoption of the "voluntary principle," as a leading antebellum commentator, Robert Baird, first labeled it—produced an atmosphere in which Americans were "trained to exercise the same energy, self-reliance, and enterprise in the cause of religion which they exhibit in other affairs." *Id.* at 290, 292. Americans created new churches, schools, and social services through precisely the kind of charitable initiative that Arizona has facilitated with tax credits.

1. Government aid benefiting religious institutions.

The principles of voluntarism and substantive neutrality are directly reflected in this Court's approval of private-choice programs of educational aid. To reiterate, in such programs the government creates no incentives to choose a religious or nonreligious school: individuals decide to apply their benefits based on whether they have "zeal" for, or find "appeal" in, a particular school's education or ideology. *See Zorach*, 343 U.S. at 313. "Financial aid can be distributed in a way consistent with individual choice": "[e]ach family receiving a government voucher can choose the school that it prefers among all the options available," and "even where the choices are inadequate, there are more choices with the voucher than without it." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 157 (2004).

The last point in the previous paragraph deserves particular attention. It is often asserted—the court of appeals did so here—that government programs aiding private schools are impermissible because they ultimately give disproportionate benefits to religious schools or "steer" parents toward those schools. But in the absence of a private-school aid program, government funds only one, secular category: public schools, whose teaching must by definition be secular because of Establishment Clause restraints. Thus public-school-only funding

"itself is a powerful 'disparate impact' favoring secular uses and disfavoring religious ones." Eugene Volokh, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341, 348 (1999); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151, 158-59 (2003) (public-school-only funding "'steers' students away from religious and toward secular schools"); Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51, 84 (2007) (the alternative to programs of true private choice "is for government to offer up to $10,000 for education to those families, and only those families, who surrender their constitutional right to get that education in a religious environment. The coercive effect of that conditional offer dwarfs the benefit to religion of making the money available on equal terms.").

Private-school aid programs therefore increase choice, even if only to a limited extent, over the previous secular-only option of public schools. This fact does not mean, of course, that such programs are constitutionally required. But it does confirm why *Zelman* and other decisions have recognized them as permissible, and why grudging, restrictive approaches like the panel's here frustrate religious liberty rather than promote it. Specifically, as we discuss *infra* (pp. 30-35), the public schools should typically count as a "genuine secular option" under the *Zelman* test.

The adoption of voluntarism in the founding period and the early Republic typically meant the end of state financing that had been given to

religious institutions alone or to one particular denomination. But the promotion of voluntary choice in religious matters does not necessarily mean, and has not meant in our tradition, that government aid can never benefit religious institutions that provide services such as education or humanitarian work that the state wishes to support. The modern activist state frequently pursues these goals by supporting private institutions. When it does so, voluntarism and private choice are best served not by excluding religious institutions, but by including them, on equal terms, in aid that is channeled to them on the basis of individuals' choices.

These benefits of true private choice also help define the limits of true-private-choice programs. Money can flow from government through private individual choices to religious institutions only when those institutions are providing some secular service—education, health care, social services, etc.—that is also provided by secular institutions. Religious providers may offer the service in a religious environment, or with additional religious services attached, but they are eligible for the program only if they are providing some secular service that the state desires to subsidize. Religious schools in Arizona teach all the subjects in the compulsory education curriculum as well as whatever they teach about religion. The logic of true private choice could not justify a subsidy to the religious functions of the church itself—even if every religious organization in America were treated equally—because there is no equivalent secular

program that could be packaged with the religious functions in a program of private choice.

The Court's approach in private-choice cases also eliminates another means by which a government aid program might interfere with religious choice and autonomy. Such a concern arises if the conditions on aid require the institution involved to secularize its operations. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 619-20 (1971) (holding that aid conditions mandating that subsidized teachers present courses from a secular perspective required "excessive entanglement" for the state to police). In *Lemon*, a case not involving a private-choice program, the Court held that although conditions on subsidized teachers and the content of subsidized courses were objectionable, to proceed without such restrictions was also unconstitutional. *Id.* at 619. But with a private-choice program, there is no such "Catch 22" (*Bowen v. Kendrick*, 487 U.S. 589, 615 (1988)). The school or social service ultimately benefiting can be thoroughly religious, in a particular activity or in its overall character, because the aid reaches it as a result of private rather than governmental decisions. *See, e.g., Zelman* (upholding aid used at religious elementary and secondary schools); *Witters* (upholding aid used at bible school training students for the ministry). Arizona's statute is consistent with this model: it places almost no restrictions on the autonomy of the schools to which taxpayers may make contributions and receive a tax credit, and therefore involves little

if any surveillance or control over religious institutions. [4]

2. Other Religion Clause cases.

While the Court has relaxed restrictions on government funding of private religious institutions, it has maintained relatively strict restrictions on the government's ability to engage in religious speech itself. Recent decisions reaffirm the ban on government-sponsored religious exercises in public schools, *Lee v. Weisman*, 505 U.S. 577 (1992); *Doe v. Santa Fe Ind. School Dist.*, 530 U.S. 290 (2000), and prohibit government from sponsoring a display endorsing a particular set of religious views, *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005). Principles of neutrality and private choice explain these rulings as well. Any express religious statement the government makes is bound to favor one faith over another and thus contravene neutrality by its very terms; even an ecumenical statement that seeks to be inclusive of all faiths favors ecumenical religion over the more sectarian kinds. *See Weisman*, 505 U.S. at 590 (government may not "establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds"). Government-sponsored religious speech in public settings also is out of step with individual choice, since "[a]ny religious observance at a public event necessarily requires a collective decision": "[g]overnment must

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[4] The program's only limitation on participating schools is that an STO may not provide scholarships to schools that "discriminate on the basis of race, color, handicap, familial status or national origin." Ariz. Rev. Stat. Ann. § 43-1089(G)(2).

decide whether the content of the speech will be religious or secular, in which religious tradition, and how intensely religious, or it must delegate these choices to a selected citizen who becomes a government agent for this purpose." Laycock, *supra*, 118 Harv. L. Rev. at 158.

The precise boundaries of government's ability to speak religiously tend to be uncertain, as the Court struggles with questions such as what constitutes acknowledgment of religion rather than explicit promotion of it. *See, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005). But this case, of course, raises no such issues. The relevant point here is that the Court has reaffirmed significant Establishment Clause limits on government religious speech at the same time as it has rejected limits on even-handed government funding for education and social services provided by religious institutions. "What reconciles the speech and funding cases is the principal of minimizing government influence and maximizing individual choice." Laycock, *supra*, 118 Harv. L. Rev. at 157. Even-handed government funding benefiting multiple private institutions can promote individual choice; government expression of its own favored message, even an ecumenical one, cannot. "The speech and funding cases are thus united by a principled commitment to government neutrality and individual choice in religious matters." *Id.* at 158.

Finally, substantive neutrality and voluntarism also address questions concerning the free exercise of religion: they show when distinctive accommodation of religious exercise is appropriate. Sometimes the

government may or even must treat religion differently from other ideas and activities in order to preserve the goals of substantive neutrality: private religious liberty and minimum government interference in religious choices and commitments. For example, the government may accommodate private, voluntary religious exercise by exempting it from burdensome regulation, even if the exemption does not "come packaged with benefits to secular entities." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). Even though such an exemption gives religion distinctive treatment, it is constitutionally legitimate if it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice." *Thomas v. Review Bd.*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting).[5]

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[5] Accommodation of religious choices may frequently be a matter of government discretion rather than constitutional mandate. *See Employment Division v. Smith*, 494 U.S. 872 (1990); *compare Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). But that constitutional interpretation stems largely from concerns about judicial competence to declare exemptions, not from a rejection of the importance of religious choice. *See id.* at 890 ("to say that a nondiscriminatory religious-practice exemption 'is permitted, or even that it is desirable,' is not to say that . . . the appropriate occasions for its creation can be discerned by the courts"). In any event, there remain questions about the precise scope of *Smith*, to what extent it still requires or leaves room for constitutionally mandated exemptions from facially religion-neutral laws. *See, e.g., Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365-366 (3d Cir. 1999) (Alito, J.) (interpreting *Smith* and *Lukumi* to require holding that exemption in law for even one comparable secular interest generates constitutional duty to exempt religious practice too).

The principle of substantive neutrality or voluntarism therefore unites and explains decisions of this Court in a variety of areas. It explains when government should treat religion the same as other activities and when it should treat them differently. The principle accounts for why the Court recently has rejected Establishment Clause restrictions in one major area, even-handed government funding of private religious institutions, while maintaining them in another, government's promotion of its own religious speech. The themes of choice, voluntarism, and substantive neutrality should be fundamental to the jurisprudence of the Religion Clauses as a whole.[6]

II. Arizona's Program Promotes True Private Choice And Substantive Neutrality, And The Court Of Appeals' Arguments To The Contrary Are Meritless.

Arizona's program of tax credits for contributions to organizations funding scholarships at private schools unquestionably involves true private choice under the criteria set out in *Zelman* (*see supra* pp. 8-10). The state tax credits are separated from religious schools by "multiple layers of private, individual choice": a private STO must form and must choose to fund religious schools, a taxpayer taking the credit must donate to that STO, and a family must choose to apply for a scholarship for its

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[6] The overall value of choice or substantive neutrality may lead to specific, distinct principles for particular categories of Religion Clause cases. But those principles, *amici* believe, should ultimately serve the values of private choice, voluntarism, and religious autonomy.

child at the religious school. Pet. App. 90a, (O'Scannlain, J., dissenting from denial of rehearing en banc).[7] At each step, the program's terms are religion-neutral, with "no evidence that the State deliberately skewed incentives toward religious schools" (536 U.S. at 650): taxpayers can choose any STO, the STOs can support religious or nonreligious schools, and parents can seek scholarships at either category of school.

The court of appeals panel held that the program could be declared invalid on the ground that "[u]nlike parents' choices under the program in *Zelman*, or aid recipients' choices under other programs the Court has upheld, parents' choices are constrained by those of the taxpayers exercising the discretion granted by Section 1089." Pet. App. 28a. Assuming the truth of the plaintiffs' allegation that more than 85 percent of the scholarship money at

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[7] Although this case clearly passes benefits through individuals, *amici* do not believe that a program must formally do so in order to be a program of private choice. As four justices recognized in *Mitchell v. Helms*, 530 U.S. 793 (2000), aid given directly to religious schools or social services can also follow private choice when its terms are neutral and the amount is "based on enrollment." *Id.* at 830 (opinion of Thomas, J.). The per-capita allocation formula "create[s] no improper incentive" for religious education and ensures that "[i]t is the students and their parents—not the government—who, through their choice of school, determine who receives . . . funds." *Id.* Although this case raises no questions about direct-aid programs, it is important to note that a rigid distinction between indirect and direct aid disserves the value of choice and also creates unnecessary, formalistic questions about whether to classify aid as direct or indirect. We therefore urge the Court to phrase its opinion in such a way that allows that properly constructed direct-aid programs may also qualify as programs of private choice.

this time "is available only for use at religious schools," the panel said, the program "skews aid in favor of religious schools, requiring parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education." *Id.*[8] Thus, "from the parents' perspective," the program was not neutral toward religion but "created 'financial incentives' . . . that 'ske[wed]' the program toward religious schools'" and denied parents a "'genuinely independent'" choice to use secular schools. Pet. App. 30a-31a, 22a, (brackets supplied) (quoting *Zelman*, 536 U.S. at 653; *Witters*, 474 U.S. at 487-88).

The court of appeals' argument is meritless, for two reasons.

A. Individuals' Decisions to Fund Religious Education through STOs are Genuine Private Choices Just as Much as Are Individuals' Decisions to Attend Religious Schools.

The court of appeals did not and could not claim that the Arizona law skewed taxpayers' decisions toward contributing to religious rather than secular schools. Rather, the panel held that taxpayers' decisions, through STOs, to contribute heavily to religious schools skews parents' decisions toward

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[8] As petitioners emphasize, these facts are essentially unquestioned, so the court of appeals was not just denying a motion to dismiss but was effectively invalidating the Arizona program.

attending religious rather than secular schools. Pet. App. 30-32a. Although the panel acknowledged that taxpayers' decisions were likewise private choices, it fundamentally analyzed them as part of the program affecting parents' choice. Thus it effectively treated them as state actions, *see* Pet. App. 37a (referring to "delegation" of the state power "of scholarship funding to individual taxpayers").

This approach is untenable. Taxpayers' decisions to contribute to STOs, and STOs' decisions to support religious schools, are also fully private choices for purposes of Establishment Clause analysis. There is no basis for distinguishing taxpayers' voluntary decisions to support religious schools from families' decisions to attend those schools.

First, the court of appeals' distinction is irreconcilable with *Zelman*, where the private choices of families to use religious or secular schools were likewise constrained by the private actions of others who chose to operate or support such schools. The panel was flatly wrong to say that constraints on parents' choices make this case "unlike . . . *Zelman*." Pet. App. 27a. The *Zelman* plaintiffs and Justice Souter's dissent objected that 82 percent of the private schools participating in the Cleveland voucher program were religious, about the same percentage as the panel found objectionable here. 536 U.S. at 703 (Souter, J., dissenting) (46 of 56 private schools in district were religious).[9] The

[9] Just as the 82 percent figure for religious schools in the *Zelman* program was similar to the religious-school percentage among Ohio private schools, so the 85 percent religious-school

Court flatly rejected the relevance of this figure, holding—in line with earlier cases—that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations," any more than it turns on whether "most recipients choose to use the aid at a religious school." 536 U.S. at 658; *accord Mueller*, 463 U.S. at 401. Nor can the constitutionality of Arizona's neutral tax-credit and scholarship program depend on whether most STO contributions go to religious schools.

A major reason the Court has given for rejecting that approach is that it is impossible to administer. "As we said in *Mueller*, '[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.'" *Zelman*, 536 U.S. at 658 (quoting *Mueller*, 463 U.S. at 401). "To attribute constitutional significance" to the percentage of private-school options that are religious, *Zelman* said, would have "the absurd result" of making "a neutral school-choice program . . . permissible in some parts of Ohio, . . . where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the

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share of this program is similar to Arizona's overall percentages. Pet. App. 30a, 64a. Religious schools continue to make up a large part of the private school market in most parts of the country. A major reason is that public schools must be free from religious elements and they therefore absorb much of the distinctive demand for nonreligious education.

preponderance of religious schools happens to be greater." *Id.* at 657. "Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools." *Id.* at 657-58. The tallies would also repeatedly shift based on the "private decisions made in any given year by thousands of individual aid recipients." *Id.* at 656 n.4.

The court of appeals' approach here suffers the same crippling problems of manageability. Indeed, the court below added another problem by basing its determination of invalidity on the fact that more parents have applied for scholarships than are available at secular private schools. Pet. App. 30a-32a. This adds yet another shifting feature to the kaleidoscope: the number of parents who happen, at a given place or time, to want a secular private education.

The court of appeals' ruling violates *Zelman* not just because it is impossible to administer, but more fundamentally because it rejects *Zelman*'s principles concerning private choice. For example, Justice Souter objected to the Cleveland program for precisely the reason the panel gave here: that religious schools allegedly had an advantage because of, among other things, "donations of the faithful." 536 U.S. at 705 n.15. The *Zelman* Court made short work of that assertion, pointing out that nonreligious schools can receive the same assistance if people want to give it to them. 536 U.S. at 656 n.4 (noting

"that nonreligious private schools operating in Cleveland also seek and receive substantial third-party contributions" and that "several *nonreligious* schools have been created" since the voucher program began) (emphasis in original). The same, of course, is true here. Taxpayers who favor secular private schools can form STOs limited to that purpose, contribute to them, and receive tax credits. Absolutely nothing in the program's terms or structure discourages them from doing so.

Ultimately, the complaint that too many contributions under the program have been directed to religious schools is a complaint that voluntary religion is vigorous among Arizona taxpayers. It objects to the fact that schools from religious traditions or perspectives have attracted greater contributions "according to the zeal of [their] adherents and the appeal of [their] dogma" (*Zorach*, 343 U.S. at 313). As we have already noted (*supra* p. 13), our tradition of voluntary initiative in religious matters includes initiatives to form and support religious entities, not just decisions to attend or benefit from them. As Robert Baird observed, the voluntary principle—the elimination of financial favoritism by the state in religious matters—unleashed groups to form institutions and philanthropists to fund them. Baird, *supra* p. 13. In other words, it facilitated the voluntary supply of religious activity as well as the voluntary demand for it. On either side, private choice is private choice. The issue, as *Zelman* put it, is not "whether more private religious schools currently participate in the program," but whether "the program . . .

somehow discourage[s] the participation of private nonreligious schools." 536 U.S. at 656.

Beyond misreading *Zelman* to apply only to parents' choices, the panel offered one further reason for distinguishing taxpayers' and parents' choices:

> Unlike parents, whose choices directly affect their children, taxpayers have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons, such as the academic caliber of the schools to which a STO restricts aid, rather than for sectarian reasons, such as the religious mission of a particular STO. Thus, the taxpayers' position in the structure of Section 1089 provides no "effective means of guaranteeing" that taxpayers will refrain from using the program for sectarian purposes.

Pet. App. 41a (quoting *Larkin v. Grendel's Den*, 459 U.S. 116, 125 (1982)). This argument is both inaccurate and a fundamental distortion of the Religion Clauses.

First, the generalizations about parents' and taxpayers' motivations are inaccurate. Parents often choose to send their children to religious schools so they can receive instruction in a particular faith. Catholic parents, for example, have a prima facie duty under canon law "to send their children to those schools which will provide for their *catholic* education." "1983 Code of Canon Law," c.798

(emphasis added); *accord id.*, c.793, §1 ("Catholic parents have also the duty and the right to choose those means and institutes which, in their local circumstances, can best promote the catholic education of their children."). It is hard to see why this is not a "sectarian" consideration under the panel's definition: it certainly "promotes the religious mission of [the Catholic] school" (Pet. App. 38a), and many parents intend to do just that. Conversely, taxpayers may give money to STOs funding secular education in religious schools because they think those schools provide the best education.

In reality, the panel's distinction collapses. Parents who send their children to religious schools often think that a religious component or setting is an important element of a good education. So do taxpayers who support the schools with contributions. Those considerations could be called both "educational" and "sectarian."

Most importantly, the panel's distinction is irrelevant. There is no constitutional policy that taxpayers should "direct their contributions primarily for secular reasons . . . rather than for sectarian reasons" (Pet. App. 41a). Private choices can be "sectarian"; individuals and private groups who take voluntary steps to "promote [a] religious mission" (Pet. App. 38a) are exercising their religious freedom, whether they are parents, private school employees, or taxpayers. "A law is not unconstitutional simply because it *allows* churches," or private individuals, "to advance religion. . . . For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has

advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337 (emphases in original). To hold that individuals' voluntary funding choices create constitutional problems when they are made to advance religious goals is to misunderstand the Religion Clauses at the most basic level.[10]

B. Arizona Provides Genuine Secular Options, Which Under *Zelman* Include the Public Schools that the State Already Funds.

The percentage of STO-funded schools that are religious is irrelevant for a second reason: an immense range of secular options are available to parents through Arizona's public schools. The calculation whether a state offers genuine secular alternatives under *Zelman* must include the public schools that the state already funds. It does not matter that public schools fall outside the scope of the particular program at issue. As the Court said in *Zelman*, "The Establishment Clause question is

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[10] Indeed, to base invalidation of an aid program on the principle that government must ensure private decisions are not made for religious reasons would unquestionably have the effect of "inhibit[ing]" religion, *Lemon*, 403 U.S. at 612, and singling out private religious activity for a disability, *see Lukumi*, 508 U.S. at 533. For the reasons set forth in the petitioners' briefs, this case bears no resemblance to *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). That taxpayers as a whole can exercise a general choice and fund schools that provide secular educational value, but with accompanying religious content, bears no resemblance to the prospect in *Grendel's Den* that a church might use an exceptional power of vetoing liquor licenses (a power shared only by schools) to accomplish goals such as favoring its own members. *See id.* at 125.

whether [the state] is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options [the state] provides [ ] schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." 536 U.S. at 655-56 (emphasis in original); *accord id.* at 676 (O'Connor, J., concurring) (court must evaluate "all reasonable educational options Ohio provides the Cleveland school system, regardless of whether they are formally made available in the same section of the Ohio Code as the voucher program"). In *Zelman*, the Court included in the "range of educational choices" that school children "remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community [i.e. charter] school, or enroll in a magnet school." *Id.* at 655.

Treating public schools as genuine secular options recognizes a point emphasized in our first section: Any analysis of whether an educational aid program promotes choice must take into account that the state already funds public schools, typically to the point of making tuition free or nearly so. *See supra* pp. 14-15. If a court ignores this, it fails to describe accurately the actual choices parents have. Ignoring the fact of public-school funding also produces a perverse result: a court strikes down a program of private-school aid for failing to provide adequate choices, therefore putting parents back in the situation where their choices are even more limited because secular public schools are the only option funded.

By its terms *Zelman* indicates that the ordinary public schools should count as a genuine secular option. 536 U.S. at 655 (noting that one choice for children was to "remain in public school as before"). Indeed, here as in *Zelman*, public schools are more attractive in one important sense: state aid covers their entire tuition, rather than simply a portion as with most private schools. See Pet. App. 53a (district court noting that "[a]n Arizona student may attend any public school in the state without cost. . . . In contrast, the average scholarship paid by STOs in 2003 for students to attend private schools was $1,222, a sum unlikely to cover all of the costs of private school attendance."); *Zelman*, 536 U.S. at 654 (parents choosing private schools "must copay a portion of the school's tuition," while parents choosing public-school options "pay nothing"). And no question has been raised here about the educational adequacy of Arizona's ordinary public schools.

The en banc concurrence in the court of appeals, defending the panel's decision, claims that upholding Arizona's program would require overruling *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which struck down, among other things, programs of tax credits and tuition reimbursements for parents whose children attended private schools. Pet. App. 74a-75a (Nelson, J., joined by Reinhardt and Fisher, JJ., concurring in the denial of rehearing en banc). *Amici* believe that overruling *Nyquist* would bring helpful clarity to the law, since nearly all of the opinion's reasoning has been undercut by decisions from *Mueller* through *Zelman*. Although

the reimbursements and tax credits in *Nyquist* went to parents only because they had voluntarily chosen a private school, the majority found this unimportant because tuition-tied aid was not restricted to a religious school's secular activities (413 U.S. at 781-83, 791)—an argument that the "private choice" cases from *Mueller* through *Zelman* plainly reject. *Nyquist* objected to private-school aid programs on the ground that "the bulk" of their ultimate beneficiaries were religious schools, *id.* at 780—an argument undercut by the Court's clear, recent refusal to look at the percentage of beneficiaries under a religion-neutral program. Most basically, in measuring whether aid had the effect of advancing religion, *Nyquist* refused to consider the fact that the state already subsidized public schools, 413 U.S. at 782 n.38—while *Zelman* says that the court must "evaluat[e] *all* options [the state] provides [to] schoolchildren." 536 U.S. at 656 (emphasis in original). Until the Court repudiates *Nyquist* altogether, plaintiffs and lower court judges may try to return to its reasoning, as the panel did here, by seizing on minor distinctions.

Although overruling *Nyquist* would have a beneficial effect, we hasten to add that the Court need not overrule it in order to uphold Arizona's program. *Zelman* distinguished *Nyquist* on the ground that Ohio provided Cleveland parents a variety of public-school options alongside private-school vouchers, including community (or charter) schools, magnet schools, and supplemental tutoring in the regular public schools. Thus, the Court said, parents choosing vouchers "receive from the State precisely what parents who choose a community or

magnet school receive—the opportunity to send their children largely at state expense to schools they prefer to their local public school." *Zelman*, 536 U.S. at 660 n.6. Here too, the state provides a variety of public-school choices. As the Arizona Supreme Court noted, the state legislature "has, in recent years, expanded the options available in public education." *Kotterman v. Killian*, 972 P.2d 606, 611 (Ariz. 1999) (noting charter schools and open enrollment); *see also* Pet. App. 99a-100a (O'Scannlain, J., dissenting from denial of rehearing en banc) (noting open enrollment, tax credits for donations to public-school activities, and charter schools).[11]

In the end, *amici* believe, it should not be constitutionally significant whether a state's public schools include charter or magnet schools. Ordinary

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[11] The panel's opinion is also inconsistent with *Nyquist*—and numerous other decisions of this Court—in holding that an aid program for private education might be said to lack a secular purpose. Pet. App. 19a-20a. Although *Nyquist* found that the various forms of aid had an unconstitutional effect, it quickly dismissed the argument that they lacked a secular purpose. 413 U.S. at 773 (stating that "we do not doubt," "nor do we hesitate to acknowledge," the purposes of promoting educational quality and pluralism). No decision by this Court has ever suggested, as the panel here did, that the prospect that most aid might be used at religious schools makes the legislature's declared purposes a "sham." Rather, "governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (citations omitted). This point reinforces how extreme the panel opinion is.

public schools, if adequate, count as a genuine secular alternative under *Zelman*. *See* 536 U.S. at 655. The addition of public-school choices should be a matter of educational policy, not a precondition to the constitutionality of any aid for families who choose to use private schools. It would be clearer for the Court to overrule *Nyquist* rather than to distinguish it on the thin ground that there are charter or magnet options in public schools. But we reiterate that if the Court is reluctant to overrule *Nyquist*, it can distinguish it here on the same ground—the presence of various public-school options—that distinguished *Zelman*.

Finally, the en banc concurrence claimed that if public schools counted for purposes of evaluating secular options, then "a program that provided tax deductions exclusively to parents sending their children to *religious* schools" would be valid as "a 'neutral educational assistance program'" as long as the state had public schools. Pet. App. 75a (Nelson, J., joined by Reinhardt and Fisher, JJ., concurring in the denial of rehearing en banc). This argument is a non sequitur. Regardless of whether secular public alternatives exist, a program encompassing religious but not secular private schools would violate *Zelman*'s separate requirement that the state make aid available "on neutral terms, with no reference to religion." 536 U.S. at 653; *see id.* at 652 (requiring that aid be "neutral with respect to religion" as well as channeled through individual choice). With such discriminatory terms, the state would indeed "deliberately ske[w] incentives toward religious schools." *Id.* at 650.

But formal, purposeful state discrimination against parents' secular-school choices is entirely different from this situation: an even-handed state program where parents' actual choices are affected by the menu of options provided by private initiative. The latter is inevitable when a sector is left to voluntary action—and whenever religion is left, as is proper, "to the zeal of its adherents and the appeal of its dogma" (*Zorach*, 343 U.S. at 313). As Judge O'Scannlain put it: "If the government takes the constitutionally required hands-off approach, external factors will define the playing field." Pet. App. 97a (O'Scannlain, J., dissenting from denial of rehearing en banc). It bears repeating, however, that even with limited private-school options, the public schools remain as a genuine secular option—and that it is perverse to strike down private-choice aid programs, which typically increase parents' choice, on the ground that they do not increase it enough.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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